UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	.	Case No. 09-50026-mg
	.	Chapter 11
	.	
MOTORS LIQUIDATION COMPANY, et al., f/k/a GENERAL MOTORS CORP., et al,	.	(Jointly administered)
	.	One Bowling Green
	.	New York, NY 10004
Debtors.	.	
	.	Thursday, July 19, 2018
. . . . .	.	2:09 p.m.

TRANSCRIPT OF (CC: DOC# 14338, 14331, 14332, 14340, 14344)
ORAL ARGUMENT REGARDING THE APPLICATION OF FED.R.CIV.PROC. 23
TO THE PENDING SETTLEMENT APPROVAL AND CLAIMS ESTIMATE MOTION
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY COURT JUDGE

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(Proceedings commences at 2:09 p.m.)

THE COURT: Please be seated. We're here in Motors Liquidation Company, 09-50026. I have the list of appearances in front of me. Let's begin with New GM's argument.

MR. BASTA: Good afternoon, Your Honor. Paul Basta from Paul Weiss on behalf of New GM. Your Honor, I have an outline to guide my argument.

THE COURT: Okay.

MR. BASTA: It will appear on your screen, and we'll hand copies to our friends on the right here. Would you like a hard copy, as well?

THE COURT: I will because I sometimes make notes on it.

MR. BASTA: Okay.

THE COURT: Thank you.

MR. BASTA: Your Honor, we have organized our argument today in three sections. We're happy to go in whatever order Your Honor would like, but we can jump around and answer questions. The first section is our primary case as to why we believe Rule 23 must be applied to the proposed settlement agreement. The second section addresses the movants' proposed workaround to Rule 23 and why we believe the workaround does not work. The third section covers, well, what would happen if Your Honor agreed with us. We outlined where we are on mediation with the personal injury/wrongful death

claims, and we can give Your Honor views as to where we could go from here if Your Honor were to agree with us that Rule 23 applied.

Let me begin with why we believe Rule 23 must be applied to the proposed settlement. Three distinct threads: First, there's no question that the proposed settlement seeks to assert class claims, and we believe that that violates Musicland, Blockbuster, and the Motors Liquidation case. There's no question that after the settlement agreement is approved, that the class claims are deemed authorized to be filed and filed, and we believe that that violates the agency requirement laid out in American Reserve and Musicland.

And then, third, the proposed settlement agreement, without question, seeks to settle class certification issues, and that happens at the settlement agreement approval stage, and we believe that violates Amchem, Borders, and Partsearch. So let's take each one of those in turn.

It's crystal clear that the economic loss plaintiffs seek to assert class claims. Back in 2016, before the Court entered the scheduling order, the plaintiffs told the Court that they would pursue class claims in the bankruptcy. On December 22nd, the plaintiffs filed their late claims motion seeking to file proposed class claims, and that's laid out in the very beginning of that late claims motion, and they seek to assert class claims on a proposed nationwide basis.

The plaintiffs argued that they met the requirements for class certification. They said that individual joinders of all class and sub-class members is impracticable, the class can be readily identified, and the questions of law, in fact, common to the class predominate. The plaintiffs told the Court that they would seek certification at the appropriate time after the conclusion of discovery in the MDL.

This year, one -- in April, one day before signing the proposed settlement agreement, the plaintiffs amended the proposed class claims and continued to proposed nationwide treatment. In the revised filing, they said that there were no obstacles to proceeding on a class basis and that they believed that class-action treatment was superior to other methods of dealing with the situation.

The case law is clear, Your Honor, that absent class certification, a proposed class claim cannot assert claims on behalf of anyone other than the named plaintiffs. That's laid out in Judge Gerber's decision in Motors Liquidation Company, where the Court said that the claim can be asserted as a class claim if, but only if, it has shown compliance with Rule 23. Blockbuster court held that in determining whether to permit the filing of a class claim, bankruptcy courts must determine that class certification requirements have been met. Similar rulings in Musicland and in White Motor Company and Chaparral.

Second thread: What is the status of a proposed

class claim prior to certification? Does it count as a filed claim? And, Your Honor, I think that the -- you know, the two most important cases that drive the outcome here are American Reserve Corp. and Amchem. And American Reserve Corp. is the first case which authorized class claims in bankruptcy. And in that case, all prior courts that had addressed class claims in bankruptcy got caught up on Section 501 of the Bankruptcy Code that said to file a claim, it has to be filed by the creditor. And Judge Easterbrook, in American Reserve, said that that's not exactly true, that under Rule 3001(b), a claim can be filed either by a creditor or by the creditor's authorized agent, and that the process of certifying the class creates the agency relationship that allows the claim to be an authorized filed claim.

The Court says in the middle -- classes are -- excuse me, Your Honor -- not every effort to represent a class will succeed. The representative agent is an agent only if the class is certified. And it's this language that ties the whole body of law together because, prior to certification, the class claim is not even a filed claim because there has been no agency authority for the filing of that claim. And that's why we believe that it's a gating item.

The movants take the position that the class claim can be estimated, even though it has not been certified and therefore has not been filed, and that is inconsistent with two

cases that we found, Your Honor, American Solar King and Lehman, both of which hold that unless you have a filed claim, there is nothing to estimate.

THE COURT: Don't courts in asbestos cases estimate -- I don't know what to call it -- potential claims?

MR. BASTA: Yes.

THE COURT: I mean, they're not filed claims. Future claims. They're not even claims under 101.

MR. BASTA: Yes.

THE COURT: But yet bankruptcy courts -- there's quite a few decisions where they -- cases where they do estimate those claims.

MR. BASTA: In -- I can get that a little bit later in the outline, Your Honor, but the --

THE COURT: I gave -- later, all right.

MR. BASTA: No, no, no. The -- I've done estimation of mass tort cases before. In those cases, the question is what are you estimating for, and you can estimate for the purposes of creating a reserve or saying I need to set aside this amount of money for the asbestos class, but that's not estimation for allowance purposes.

THE COURT: What happens in most cases, the mass tort cases, where it's been estimated for reserve purposes? How is it later dealt with?

MR. BASTA: Either there's a settlement or -- a class

settlement or there is a -- there is an actual allowance process for the claims or on how those claims will actually be allowed, but distributions do not go unless there has been an allowance mechanism.

THE COURT: And procedurally have you dealt with cases where they've been estimated for reserve purposes, and later on you said they are settled on a class basis?

MR. BASTA: They're settled on a class basis, yes.

THE COURT: And when they're settled on a class basis, explain to me how that occurs.

MR. BASTA: Then you would go through the class certification process at that time to determine class certification so that the claims can be allowed.

THE COURT: And have any of those class -- have you been personally involved where there has been a settlement of the class claims that were previously estimated for reserve purposes?

MR. BASTA: I have not, Your Honor.

THE COURT: But has that occurred to your knowledge?

MR. BASTA: I do not know, Your Honor. I cannot recall. But I know that the way that this settlement agreement --

THE COURT: I'm not interested in this --

MR. BASTA: I know.

THE COURT: This is what it is, but I'm trying to

understand because I read some of the asbestos cases, for example. I didn't read -- I may have read some of the other mass tort cases, but I definitely read the asbestos cases where they've estimated. Yes, it sets up a reserve, but it was unclear to me what happens later about how claims -- are individual claims filed? Are class claims filed? Does class certification occur? How has that been done?

MR. BASTA: Your Honor, in that scenario, unlike this scenario where the debtor is still in possession, there would be more tools available to the debtor, I believe, to implement the settlement because, once the debtor had reached an agreement, the debtor could file claims. There could be an agreement that claims would actually be filed to -- and then they would be allowed through that process. One of the things that makes this unique is that we are beyond that period of time.

THE COURT: Why can't -- here there is a proposed settlement between the GUC Trust, which is standing in the shoes of Old GM.

MR. BASTA: Right.

THE COURT: Why can't it settle with the signatory plaintiffs to provide for claims of all economic -- we're not -- and you agree that we're not dealing today with personal injury/wrongful death, right?

MR. BASTA: Right.

THE COURT: So why can't the GUC Trust agree with the signatory plaintiffs to allow claims or allow the -- in effect treat them as filing the claim? I understand the amount is still uncertain and they propose an estimation as a way of resolving that. So, I mean, in -- I guess in the asbestos cases I've read, for example, there was no agreement between the debtor or a successor trust and putative plaintiffs. Here there is.

MR. BASTA: Right.

THE COURT: Why doesn't that make a difference?

MR. BASTA: Well, I guess the -- I still think the question is they can reach that agreement. They could reach that agreement with the plaintiffs that have actually filed claims, the two class representatives. They could reach that agreement, but I don't know how they could reach an agreement to file claims on behalf of the eleven and a half million class representatives. There still needs to be an agency link so that those people out there in the world that have the eleven and a half, that they're giving the authority for the filing of the claim.

Why is that so? Because it may have been an inapposite question I asked last time, but at the last hearing, I think I asked the question, if a debtor had scheduled claims, they would be deemed allowed unless objected to. Why couldn't the trust, in effect, schedule the claims but identify them as

disputed and then resolve through a settlement that they will be -- that the amounts of the claims will be fixed through an estimation process? Why doesn't that work?

MR. BASTA: I'm just going to move to that section. Could you give me one minute, Your Honor? I'll move to that --

THE COURT: If you want to -- Mr. Basta, I'm perfectly happy just -- if you can come back to my question, your organization may make more sense than what I've asked. I'm happy to let you go on.

MR. BASTA: I appreciate that, Your Honor. I have a section on why we don't believe that that works that's more linear, and I think I could get it in a more organized way if I get to it then.

THE COURT: That's fine.

MR. BASTA: Thank you.

THE COURT: You can do that then.

MR. BASTA: Thank you. So if it's clear under American Reserve that there's no agency relationship and therefore there's no filed claim without certification. What is the movants' argument that a class claim can proceed without class certification? And, interestingly, they cite really the same cases that we cite. They cite Musicland and they cite Motors Liquidation for the proposition that there are greater procedural advantages in bankruptcy, and therefore you don't need to do class certification.

But all of those cases hold for the proposition that you either have to have a filed claim by the creditor itself or you need class certification to create the agency relationship so that there are claims on file on behalf of everybody who's a putative member of the class. We haven't found any case that stands for the proposition that you can just treat the eleven and a half million as-filed claims without an actual agency or are properly processed.

It's also absolutely clear that this is a settlement of the proposed class claim issues. The settlement motion, which seeks to approve the settlement, says very squarely that the settlement agreement resolves the late claims motions, the late proof of claim issues, and the allowance of plaintiffs' claims. By the time we get through the settlement agreement phase, as Your Honor just pointed out, the only thing that would be left to estimation would be to quantify the amount of the claim.

THE COURT: Some of them may be at zero. If -- and I think Mr. Weisfelner said at the last hearing that they appeared -- well, let me just say they appear to agree that state law continues to apply. They acknowledged variations in state law, as already determined by Judge Gerber. And if the state -- if the law of a particular state where someone purchased a vehicle and claims economic loss requires manifestation and they haven't had manifestation, they appear

to agree that that would be the law that applied, and it might result in the claim being estimated at zero.

MR. BASTA: But -- and Mr. Weisfelner did mention that at the last hearing, and I do think that is what's being worked out right now in the MDL. And when we get to estimation, what's happening in the MDL will translate into the estimation in this court.

THE COURT: But, of course, the MDL relates to claims against New GM, not against Old GM.

MR. BASTA: It is true that the MDL relates to New GM and not Old GM, but the elements of the claims against New GM are the same as the elements of the claim against Old GM, plus successor liability. So what the district court is handling is many of the same issues that would be addressed here.

I mean, we actually believe that what Mr. Weisfelner said at the last hearing where he -- he gave the example that the class is eleven and a half million and that he did some math and said, based upon Judge Furman's manifest defect rulings already, that he suspected that two million may have already dropped out of the class. We think that that's an example of why class certification is so necessary.

I mean, if two million vehicles are already dropping out, I think we need class certification to decide, you know, who represents those two million vehicles, why are they being dropped out, and that's why the class certification rules are

so important. And that's why Amchem, which is the key to this section of our argument, said that, in the settlement context, you know, you even need heightened scrutiny around class certification issues to make sure there's adequate representation and that everybody is aligned.

It's clear that the settlement agreement itself is proposing to resolve all of plaintiffs' claims, and it includes a resolution of all putative class members, even though they have not participated yet in the bankruptcy proceeding. And it's also clear, Your Honor -- I think this is a very important slide for the Court to see what is occurring at the settlement stage and what is occurring at the estimation stage.

At the settlement stage, the GUC Trust is consenting to the authorized filing of the proposed class claims, and we submit that that's inconsistent with Amchem. In exchange for the $15 million settlement payment, all of the disputes, including the propriety of Rule 23 certification, are settled at the settlement stage, not at the estimation stage. And the estimation stage, as Your Honor has asked questions, is where Your Honor sees it applying the different state law rules.

But here the class certification issues would be resolved in advance of all those rules. And at the settlement stage, all eleven and a half million plaintiffs will be bound by the settlement agreement and will be delegating to signatory plaintiffs the right to adjudicate their relative recovery to

other members of the groups.

So if someone is in a state that requires manifest defect, there is no process to come back to this Court to say, well, those people are out and these people are in and this criteria would allow somebody to get 12 cents and this criteria would allow somebody to get 18 cents. All of that is being done without any allowance process and without any delegation of representational authority to the signatory plaintiffs to negotiate that differentiated outcome on their behalf. And so by the time you get to the estimation stage, you will have a class-wide claim, and the only thing that's -- will have waived any right to object on Rule 23 grounds, and the only thing that will be left will be to quantify things.

This is the details of how this is implemented. Section 2.5 of the settlement agreement says that the settlement agreement, not the estimation trial, authorizes the filing. That's in 2.5(x). The settlement motion expressly says that class certification is being settled. It says in the absence of the settlement, the Court would need to decide whether class certification for the economic loss plaintiffs' proposed class proof of claims would be appropriate. This could lead for the need to resolve issues under the very laws of the 50 states and the District of Columbia. So they're clearly seeking to settle class certification rather than show that class certification requirements have been satisfied.

THE COURT: Although I understood the plaintiffs to agree that, as part of the estimation process, the Court would consider applicable state law from each state in which the cars were purchased. I'm right about that. I mean --

MR. BASTA: I think that's correct, Your Honor.

THE COURT: So they're not -- they haven't settled that issue. They acknowledge that that's an issue for the Court to determine as to what is the applicable state law in which relevant jurisdiction.

MR. BASTA: But they're not coming in here and saying, let's do it on a class-wide basis and let's ignore all the differences in state law. They're saying, let's use the estimation to replicate what class certification would otherwise do, and we're here saying that no court has ever done that, and that when you go through the requirements of what claims can be estimated in the language of the agreement, that that's not what it provides for. You need to actually be estimating claims.

But I agree with Your Honor. I don't believe that they're taking the position that at estimation, they would ignore differences in law. The proposed settlement makes it clear that all parties' disputes are resolved. And so by the time it gets to estimation, all objections to the class claims will have been withdrawn or settled.

Movants say that when we get to the estimation, there

will be millions of claims to estimate, and that we should do the claims on a class-wide basis. I would note that it is my understanding in the MDL that, based upon Judge Furman's rulings on manifest defect, that the plaintiffs are not seeking a -- no longer seeking a nationwide claim treatment in the MDL, but they continue to seek it here.

The law is absolutely clear from the Supreme Court that the Court does not have authority to settle proposed class-action issues without certification, and Amchem we believe is the -- along with American Reserve is the second most important decision here. The Court said federal courts lack authority to substitute for Rule 23 certification criteria a standard never adopted, that if the settlement is fair and certification is proper, quote:

> "The safeguards provided by the Rule 23(a) and (b) class qualifying criteria, we emphasize, are not impractical impediments -- checks shorn of utility -- in the settlement class context."

But other specifications of the rule -- those designated to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context.

And every bankruptcy court that we have found has followed Amchem -- Worldcom, Partsearch, and BGI Group all -- when conducting settlement of class certification issues,

conducts an analysis under both Rule 23 and under 9019. We note that co-lead counsel in this situation in the W.R. Grace matter argued that where a class is not already -- a Court has not already certified a class, the Court, at the preliminary approval stage, must determine whether the class satisfies the requirements of Rule 23.

THE COURT: What does that mean -- what does that require a Court to do at the preliminary approval stage?

MR. BASTA: It requires the Court to determine class certification.

THE COURT: For settlement purposes?

MR. BASTA: For settlement.

THE COURT: The difficulty of litigating a case with eleven and a half million plaintiffs, that drops out.

MR. BASTA: It drops out. And that's what happened in Amchem. In Amchem, the Supreme Court -- the district court looked at the impracticality of the situation and allowed the fairness of the settlement and the need for the settlement to be a factor when considering whether the Rule 23 prongs had been met, and the Third Circuit and then the Supreme Court -- the Third Circuit overturned it. The Supreme Court affirmed the Third Circuit and said it's not about impracticality. These rules are foundational. You have to follow them.

THE COURT: And am I correct that if a proposed class settlement is presented to the Court, notice to the putative

class members has to be given at that stage, and they have an opportunity to appear and object if they wish or support the settlement?

MR. BASTA: Yes.

THE COURT: Okay.

MR. BASTA: Yes. So what is the basis for the movants' argument that a class claim can be settled without class certification? Again, we go back to the same cases. They say that New GM cites several cases in which courts applied Bankruptcy Rule 9019 and Rule 23 to proposed settlements at the request of the movants. However, none of these cases hold that Rule 23 certification is required to settle a group of plaintiffs' claims. But that's not true, Your Honor. Every case that is cited stands for the proposition that, as a gating item, you have to find that Rule 23 has been satisfied. And earlier on, I believe that the movants had argued that you either went under a 9019 route or you went down on a Rule 23 route.

It doesn't appear that they're continuing to make that argument because we believe the law is crystal clear that you have to do Rule 23 up front. And we don't believe that they have any response to Amchem, and that to comply with due process, Rule 23 requires prior notice to putative class members of the settlement and an opportunity to object or opt out before approval of the settlement that binds them.

Can I just take some water, Your Honor?

THE COURT: Yeah.

MR. BASTA: Your Honor, I received a note from Mr. Nomellini on the asbestos cases where he wanted me to clarify that in asbestos cases, there's always future claimants and there's always a future claims committee, and it's always arising in the plan context, not outside of the --

THE COURT: But those estimations -- according to my understanding, including not only future claims, which are not claims --

MR. BASTA: But a --

THE COURT: -- but also current prepetition claims, as well. So they've usually estimated both at the same time.

MR. BASTA: Right.

THE COURT: I'm pretty sure that's true.

MR. BASTA: And that estimation in those cases has arisen in the context of plan feasibility. So that's our main case as to why we think that Rule 23 has to be satisfied. We want to address what the workaround that the movants have proposed -- and we note, Your Honor, that we think that, you know, Rule 23 is being viewed as this incredible obstacle to getting to a resolution of this entire situation.

THE COURT: Well, when I read their brief, it doesn't seem that way because Mr. Weisfelner and the signatory plaintiffs argued that they do satisfy.

MR. BASTA: And they do argue that, but I think that the reason why we -- they are not -- in prior appearances, they said they were going to seek class certification here, and they're not now.

THE COURT: Well, that was before they had a settlement with the GUC Trust.

MR. BASTA: And that was before they had a settlement.

THE COURT: That's the big difference.

MR. BASTA: It was before they had settlement, but it's also looking at what's happening in the MDL and wanting to get things going here, and I understand that. But Rule 23 is -- could -- if it applied, would solve a lot of the problems in the structure of the settlement. It would allow the class claims to proceed. It would provide a mechanism to bind the millions of individuals that they seek to bind to the settlement, and it would provide for the millions of people who would be now represented to provide the consensual releases to the trust -- GUC Trust beneficiaries.

THE COURT: It sounds like you're arguing how they ought to certify the classes -- class or classes and -- so we can get this on its way and bind all of the economic loss --

MR. BASTA: Your Honor, we're --

THE COURT: So you're not going to oppose class certification. Is that correct?

MR. BASTA: No, we just -- we're saying that it is the mechanism that needs to be followed. That's what we're arguing.

THE COURT: What is -- do you intend to -- if I require class certification, do you intend to oppose class certification of economic loss plaintiffs? Yes or no?

MR. BASTA: We -- yes. And we intend to say that the district court's resolution of the class --

THE COURT: Well, I -- my question is, if they seek class certification in the bankruptcy court for economic loss plaintiffs who purchased their vehicles with defects, not just the -- capital I -- Ignition switch defects, but the other defects that they're seeking to settle, they purchased them before the sale to New GM. It's New GM's intention to oppose certification of one or more classes. Am I correct?

MR. BASTA: Yes. Yes, Your Honor. So what is the plaintiffs' proposed workaround? First, they take the position that the Court can allow claims on behalf of millions of individuals who did not file proof of claim through estimation under 502(c). They argue that they can send out a notice and, through a notice, they can deem all these individuals to be a party to the settlement agreement. And they argue that they can deem all of these individuals to provide a release to the GUC Trust beneficiaries. They say that this approach is the functional equivalent of a Rule 23 settlement, but we submit

that they need to show that each of their three prongs work as a matter of law. And if they don't work, we submit that Rule 23 has to be followed.

And we start with why the Court cannot estimate unfiled claims. What's the movants' argument? Movants' argument is 502(c) necessarily permits the estimation of unfiled claims for allowance purposes. What is our argument? The sale agreement, the plan, the GUC Trust agreement requires that the Court estimate claims that are capable of being allowed. We argue that no court has ever estimated the allowed amount of a claim that was never filed and that movants cite no case holding -- providing for that.

We argue that Rule 3002 requires that creditor must file a proof of claim for the claim to be allowed, and since the -- without class certification, the creditor is not filing the claim. It's not capable of being allowed and therefore cannot count against the adjustment shares threshold, as we previously pointed out, unless it's certified the class members' claims as an unfiled claim.

Both sides, Your Honor -- and this is very important -- agree that the Court needs to estimate plaintiffs' claims for allowance purposes. It's in their Rule 23 brief. It says the settlement agreement contemplates that this Court will estimate the plaintiffs' claims for allowance and distribution purposes. That necessarily means the claim has to be capable

of being allowed. The language -- we believe that the reason it's structured this way stems from the language in the sale agreement where the highlighted language says estimating the aggregate allowed general unsecured claims against seller's estate.

THE COURT: So if you have allowed general unsecured claims, the amount of the claim is fixed. What is there to estimate? A claim is allowed in a specific amount. If the claim is filed and -- or scheduled as disputed or unliquidated, it's not an allowed claim. An allowed claim is only the result of either a contested claim proceeding, or if it's estimated -- I have trouble with the phrasing of estimating the aggregate allowed general unsecured claims.

MR. BASTA: So I have a slide on this. Let me go up to that because I think that's one of the key issues here. So the language as Your Honor just read, and in my first bullet, it says the Court can estimate aggregate allowed general unsecured claims. And we differ on what that language means. And there are three words: aggregate, allowed -- estimate, aggregate, allowed, three words. And you could -- we could sit here and say to Your Honor, that means that you have to allow every single claim, and I think at the last hearing, Your Honor asked me questions whether that was really GM's position, that we were going to sit there and allow every single one of the claims because -- and if that was the reading, then you would

arguably not be giving effect to aggregate because you would do every single claim.

Now, plaintiffs take the opposite view and they say, well, what that just means is you can just estimate even unfiled claims, and our argument is that if that's the reading, Your Honor's giving no effect to the word "allowed." And what the word "allowed" in the agreement means is that Your Honor should estimate claims that are capable of being allowed. And our argument is that for a claim to be capable of being allowed, you need to look at whether it's complied with the bankruptcy rules for being an allowed claim.

Under 501, you can only make distributions to an allowed claim. And so in the absence of that filing requirement, it can never be allowed and it can never count against adjustment shares. But it is not our position, Your Honor, that we have to sit there with a -- you know, for 48 years, trying to add up all of these allowed claims.

Let me go back, Your Honor. So we were -- I was in the middle, and we just skipped ahead on what the language means. We think that it's also supported -- our view of giving effect to the word "allowance" is supported by the language in the plan and the GUC Trust agreement. And the language in the plan on estimation says that the Court -- if the Court can't estimate any contingent, unliquidated, or disputed claim, and that should constitute either the allowed amount of such claim

or a maximum limitation on such claim, i.e. a reserve. I think that's what the plan says, and the GUC Trust has similar language.

And so it's also clear that there can be no distribution under the plan unless a claim has been allowed, and that's also consistent with the bankruptcy court. The way that this has been structured, the only time that there will be allowance is at the settlement stage. And at the settlement stage, Your Honor, there's nothing to allow because there's no claims that have been filed.

Now, could they argue that this maximum limitation language in the plan authorizes the Court to do an estimation for reserve purposes? We think they could argue that, but we don't think that would go anywhere because, once you've estimated for reserve purposes, there still needs to be some allowance process somewhere down the road. And if Your Honor's going to do a reserve and then an allowance later, it doesn't make -- we don't believe that that, under the contract, would trigger the adjustment shares or advance the ball. And when you had a later class certification ruling, you could have inconsistent outcomes between the reserve methodology and the allowance methodology.

So what claims -- and this is, Your Honor, where I promised to get back to when Your Honor asked me why they couldn't just settle and deem the claims to be allowed. And

let me walk through it. We're going to start with Rule 3002(a): An unsecured creditor must file a proof of claim for the claim allowed. If they don't file it, it's not allowed.

Who must file? Any creditor whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated shall file a proof of claim. Any creditor who fails to do so shall not be treated as a creditor with respect to such claim for voting and distribution purposes.

When I was here last time, Your Honor, Your Honor said, well, couldn't the debtor have filed the claims as disputed, contingent, or unliquidated? If they had, it would not get them to where they need to be because they still need to file a proof of claim.

Rule 3021 says, distribution shall be made to creditors whose claims have been allowed, and 502(a) says a claim or interest, proof of which is filed, is deemed allowed. Section 1111(a), a proof of claim is deemed filed under Section 501 that appears in the schedules, but then there is an exception -- unless that is disputed as -- is scheduled as disputed, contingent, and unliquidated. And we certainly know this is disputed, contingent, and unliquidated, or at least disputed and unliquidated.

Section 1.54 of the plan: If no proof of claim has been filed by the applicable deadline, such claim shall not be

valid and shall be disregarded. It's consistent with Colliers, it's consistent with cases, so that's the basis for our view.

We -- movants do not cite a single case where a Court has estimated an unfiled claim for purposes of allowance, and we cite Solar King and Lehman. The Court says, it's quite another matter to assume that 502(c) alone can operate to render a contingent or unliquidated claim allowable when there's no proof of claim on file and the claim is not scheduled.

The cases cited by the movants, as Your Honor and I just discussed, go to estimation for purposes other than allowance. I will not go through each of the cases, but you have them.

There are two cases -- one of them was my case, which was MSR Resorts -- where estimation was done for the purposes of assisting in a sale transaction. In MS Resorts, we had a hotel. We were thinking of rejecting a Marriott contract. We were working with Marriott. We agree on an estimation so we could estimate rejection claims for the purposes of deciding whether it was a good business judgment for the debtor to sell the property free of the management agreement or with the management agreement rejected. They cite that for the proposition that you could estimate for other purposes, but that's very different than here, where the purpose is really being done for allowance.

THE COURT: One of the things that strikes me is estimation has been used for purposes other than what 502(c), by its express terms, provides. So, for example, there have been cases that have used estimation on administrative claims. There's nothing in 502(c) that would suggest that. So one way or another, courts have used estimation beyond the four corners of the terms of the code. Would you agree with that?

MR. BASTA: I would agree with that.

THE COURT: You did it in MSR.

MR. BASTA: I did it in MSR, but I would just say the link here is the language that says that "allow claims." And so it seems to me -- our view is that in order for it to really count, in order for us to be separated from the billion plus of adjustment shares, there needs to be a showing that what's going to trigger that is a view from the Court that these claims can be allowed. We think that that's what was bargained for in that language.

We've covered this already. They argue that Rule 23 is unnecessary based on the greater procedural advantages, but every case that they cite supports for the proposition that you either have to have a creditor proof of claim or you have to have a class proof of claim. They don't support the proposition that the Court can estimate unfiled claims.

If Your Honor looks at some of their quotations, they cite Motors Liquidation. It says, because of matters unique to

bankruptcy, class action may not be preferable, but if you keep reading, a few sentences later, it says because individual claimants could just fill out a proof of claim. They cite Ephedra to say superiority of class actions is lost in bankruptcy. Only compelling reason for allowing an opt-out class can justify Rule 23. We'd point out that they add a few sentences later that because it allows plaintiffs to file proofs of claim without counsel and at virtually no cost, we think that it's -- that they -- we understand Your Honor's point that their prior conduct was before they reached a settlement on the class claims, but I think it was clear from their prior conduct that they anticipated trying to reach a settlement.

I mean, they amended their class claim two days before the settlement agreement was signed, and they amended the class claim and it was clear even then that they were trying to proceed and that they believed that they are proceeding on a class basis. And again the structure of the settlement agreement is to proceed on a class basis and to go into estimation as a class basis. So they've not adjusted their approach to say, we're not going down class certification. Their approach is, we are doing class certification, but we're just settling it.

Let's turn to in rem jurisdiction. What does it get them? We don't think it's a substitute for Rule 23. So they

are that -- because the bankruptcy court has in rem jurisdiction over the assets of the estate, it is empowered to determine the rights of all parties with respect to the res of the estate, and therefore may issue bar orders and enjoin claims under Section 105.

What is our argument? It does more than just release claims against the estate. It binds 11.4 million individuals to a settlement agreement that they're not a party and delegates authority to the signatory plaintiffs to adjudicate their claims.

With respect to the release and waiver, the segregation of the assets, our view is that's an improper plan modification. And that's an important point, Your Honor, and it really does hurt GM because, if the GUC Trust assets were not segregated for the benefit of the existing beneficiaries, they could be used to pay down the plaintiffs' claims, which means that the damages asserted against New GM in the MDL would be less. And so the fact that these --

THE COURT: You lost me on this point. Just go back over it.

MR. BASTA: Sorry, Your Honor. Under the settlement --

THE COURT: I want to make sure I'm understanding.

MR. BASTA: Yes, I need to do it more slowly. Under the settlement agreement, the 500 million or so potential GUC

Trust assets are segregated for the benefit of existing GUC Trust beneficiaries, unit holders. That violates the plan. The plan provides for pro rata treatment for everybody. It is --

THE COURT: I'm aware of that. Go ahead.

MR. BASTA: Right. It provides for pro rata treatment. The reason why we're harmed by that is that if that $500 million was available to pay plaintiffs' claims, the plaintiffs in the MDL have recognized they can't get more than 100 cents. So if that $500 million could be used to pay down their claims, the amount of damages that are asserted against New GM in the MDL would be less. But since those -- that $500 million is being segregated for the benefit of trust beneficiaries, it's not available to us, so we suffer an economic harm. And we believe we're a party to the plan, and we believe the statute is clear that a substantially consummated plan cannot be modified. And we don't believe that in rem jurisdiction gives them an ability to modify a substantially consummated plan.

And I would point -- and I doubt this is a popular argument, but that we think this pervades everything. In other words, even if Your Honor certified the class, we would be still back here at the approval of the settlement stage, arguing that that segregation of those assets is an improper plan modification.

We also, Your Honor, believe that it's improper, through a notice, to bind parties to a settlement agreement. It's absolutely clear that that's what the settlement agreement does. It mandates that every plaintiff consent to the adjudication of their claim, and it binds them. It says in paragraph 5 of the settlement order, the settlement shall be effective and binding on all parties.

So it's not a situation where you're just sending out a notice and saying to somebody, you need to release your claim. This is actually binding them to an agreement to which they're not a party. And we have cited cases, SportsStuff, and other cases in our papers that we don't believe there's -- that a settlement agreement is binding between the parties that execute the settlement agreement and that you cannot, through a notice, force somebody to be a party to that settlement agreement.

We note that this also hits on Amchem, where one of the elements on Amchem and why Rule 23 is required, is that it -- the Court can assure itself that when parties are being bound, that they're represented adequately in connection with that process.

I've already covered the substantially consummated plan modification, so I'll move that quickly. We cite here the elements of the plan that require pro rata treatment. The settlement agreement also provides for a channeling injunction

outside of the plan, and we don't believe that that works either. If you take an example, assume that before GM's plan confirmed, GM sent out a notice and said, we're going to put half of our assets over here, and you can only look at those assets, and we're going to put half of our assets over there, and you can only go against those assets, and we're sending out a notice, and anyone who can object, you can object, but after that, we're divvying up the assets.

Well, that wouldn't work. That would be a sub rosa plan. Your Honor commented on that in the Dewey LeBoeuf matter, and we believe that if you're really going to segregate asset and pool creditors into one asset, that it can't be done in the context of a settlement. And channeling injunctions, under Adelphia and other Second Circuit case law, are really necessary for a reorganization.

THE COURT: How do you reconcile your arguments about prohibition on a material plan modification with the consequences of a due process violation by which the -- certainly as to those where there's been determined to be a due process violation, the ignition switch defect plaintiffs. They're not bound by the plan, are they? I mean, that, I thought, was the -- it's one of the conundrums we face is that the Second Circuit determined they're not bound by -- they can't be bound. They weren't given proper notice.

MR. BASTA: Well --

THE COURT: So how can your arguments about no material plan modification apply to dealing with the people for whom there was due process violation?

MR. BASTA: Your Honor, the GUC Trust agreement itself contemplates what happens if a late claim comes in, and it provides a catch-up distribution mechanism in the GUC Trust agreement. And it doesn't say that if a late claim that needs to now come into the pool, that you can segregate the assets. In fact, it's the opposite. It basically says that the -- the way it works is that the next assets that come in need to catch up the people who have been left behind until they reach the pro rata status.

And that is one of our points here, which is that under the settlement agreement, the reality is, is that we think these people, as the adjustment shares are issued, would be the only people that would get the adjustment shares because of the catch-up mechanism. All the value would have to go to get them up to the 30-cent recovery that everybody else received. But we don't believe that the fact that -- that because of the procedural due process violation, that that creates a license to force people into one set of assets and not into another.

THE COURT: If the economic loss plaintiffs and personal injury/wrongful death plaintiffs, if their recovery did not exceed the recovery of all other GM creditors, how

would New GM be adversely affected by the fact that this agreement provides for the segregation? I could see your point if the result could be that the -- while personal injury/wrongful death plaintiffs and economic loss plaintiffs together wound up with a greater recovery than all other creditors. Maybe I'm missing something in there.

MR. BASTA: So let me try it this way. The -- we have to issue adjustment shares based on the aggregate amount of general unsecured claims. That's indifferent to whether somebody gets 30 cents and somebody gets 20 cents. If the claims are above a certain amount, we have to issue the adjustment shares.

THE COURT: But how are you hurt?

MR. BASTA: We are hurt in the following respect, which is that if there's $500 million of claims -- of assets that could satisfy plaintiffs' claims, then the damages against us in the MDL are greater than they otherwise would be if the creditors could first seek recourse.

THE COURT: If all other creditors recovered 30 cents, and even after receiving the aggregate -- even after New GM issued the aggregate shares, and all of these additional new claims had a recovery of 25 cents, how are you -- how is New GM hurt by that? You have not wound up -- they -- no creditor has received more than they otherwise would.

MR. BASTA: If -- okay. Let's do the mathematical

example. Let's say that after -- let's say that the 500 million of GUC Trust assets go to existing GUC Trust beneficiaries. In the -- and then, as a result of the issuance of the adjustment shares, the signatory plaintiffs end up with 25 cents.

THE COURT: Yeah, they wound up getting less.

MR. BASTA: They get -- so now they get 25 cents. Now there's a 75-cent claim against New GM under --

THE COURT: I don't know whether there's a claim against New GM or not.

MR. BASTA: Well, asserted claim against New GM.

THE COURT: I don't know whether there's going to be a -- the position that New GM has taken previously is that if economic loss plaintiffs can recover against Old GM, they have no claim against New GM. That's been the position they've taken.

MR. BASTA: And I'm certainly not --

THE COURT: That was before you came in.

MR. BASTA: And I'm certainly not waiving that argument, Your Honor. I'm just making the point that the question here is -- if you have modifying substantially -- modifying a substantially consummated plan, there's a prohibition. In prior arguments, it has been said, you guys should not care about that, you should not care. And -- well, I disagree that that's the standard. I think we're a party to

the plan, we're a party to the sale agreement that's embedded in the plan, and so I think we have standing to argue that you can't do an improper plan modification. But even if you ask me, what is your economic interest in that issue, I would say we have an economic interest because plaintiffs are getting less from Old GM and seeking more from New GM, and the standard in Global Industries on standing is that we have to have a trifle of an economic interest to have standing, and that's certainly an economic interest to basically voice our opposition to the plan modification.

THE COURT: Okay. Go ahead.

MR. BASTA: We point out channeling injunctions are not appropriate outside of plan confirmation. They cite a number of bar order cases that arise in the settlement -- in the insurance context, when an insurer contributes money to a debtor and obtains a release of claims that are derivative of the estate claims. There -- those are really falling under, like, contribution. That's not at all what is happening here. They say nothing about the ability to force individual creditors to be a party to a settlement.

Here it's the debtor or the GUC Trust itself, not some third party, that's making a contribution. The GUC Trust is not contributing to itself to justify getting the release, and here we go through the math, Your Honor, to show that, at the end of the day, we think that the existing plaintiffs, the

plaintiffs that are here that we're addressing today, are the ones that are actually going to end up getting the $15 million and the adjustment shares if they were ever to be issued.

So what is the contribution of the GUC Trust to justify it getting the release? We don't think that its concession that it's allowing the late-filed claims and its not objecting to class certification is a contribution that justifies a release. That's a legal conclusion.

THE COURT: That you haven't persuaded me about, but -- I'm not saying you persuaded me on other things, but you definitely haven't persuaded me about this one.

MR. BASTA: Our final argument, Your Honor, is that they'll try to justify the third-party releases to the GUC Trust beneficiaries. There is no contribution that's occurring by the GUC Trust beneficiaries to support a non-consensual, non-debtor release.

THE COURT: Sure. A knockdown, drag-out battle over the next however many years.

MR. BASTA: Your Honor, that is the body of our argument. If I could turn Your Honor to where we would go from here.

THE COURT: Sure.

MR. BASTA: And I know it's not part of today, but I wanted to update the Court on what we're doing on personal injury and wrongful death claims. We requested and were in the

process of obtaining MDL order 148 information for personal injury/wrongful death plaintiffs with the intention of mediating and settling those personal injury claims.

THE COURT: And I read Mr. Weintraub's motion with an additional 69 plaintiffs. How many personal injury/wrongful death plaintiffs have asserted claims against the GUC Trust against -- in the Old GM case?

MR. BASTA: 576.

THE COURT: Okay. All right.

MR. BASTA: And what we have said -- Mr. Weintraub sent me a note and said that he would give us the information, but he wanted New GM to commit that it had an intent to mediate in good faith to settle those claims. And I responded and told him that he has that commitment with two caveats. One is that we wanted to receive the date -- the Rule 148 date from all of the 576 so we could look at it holistically, and that, second, there were some timing issues because New GM has a process to evaluate that data. And then it goes into the mediation like it has done successfully in the district court having analyzed that data, and we needed time to analyze that data.

And we've gotten some great cooperation. 450 of the 576 plaintiffs have agreed and are in the process of providing us that information. There is a set of -- I can't do the math -- 125 claims that are considering the request, but have not yet decided to give us that info.

THE COURT: Does that mean you won't go forward with mediation unless the 125 agree?

MR. BASTA: Your Honor, we're waiting -- expect them to come back and agree to provide us the information.

THE COURT: Are you prepared to go into mediation if you don't receive affirmative responses from the other 125?

MR. BASTA: Not at the moment, Your Honor. We would much prefer to deal with this on a holistic basis.

So what is our approach and suggested approach, Your Honor, if the Court were to conclude that Rule 23 is a gating item? Where do things stand in the MDL? We expect in the next few months, and I have a timeline, that the district court is going to rule on class certification in the three bellwether states, manifest defect in the remaining 35 states, summary judgment on benefit of the bargain in the three bellwether states, and on the Daubert challenge. The summary judgment covers a number of other issues including implied warranty, unjust enrichment, consumer protection, ignition switch repair, and fraudulent concealment.

We believe that following these rulings, that the bankruptcy court and the parties will have much better guidance from the MDL. If you look at this timeline, on the top part of the timeline -- excuse me for one second, Your Honor.

THE COURT: Sure.

MR. BASTA: If you look at the top of the timeline,

that is the proposed schedule that's based upon the filings by the movants for this settlement process. They filed on -- the notice -- as soon as the Court approved the notice procedures on August 1st. We've had to meet and confer with them about coming up with the customer information for the notice. It's not a "push-the-button" exercise. They have to go to IHS Polk to obtain the customer information. We believe that's a four to six week process. We've built in five weeks here. We assume once that happens, we could be at settlement here on October 31st.

Your Honor indicated previously that if the Court approved the settlement, that there would be court-ordered mediation in advance of an estimation hearing. We built that in. There needs to be fact discovery in advance of estimation. So we're looking at -- if there was no objection to class certification, we're looking at -- on its own terms, at dealing with estimation around March.

If you look at what's happening in the MDL, the briefing is complete on manifest defect in 35 states, and we're awaiting decision. By October 12th, the briefing will be complete on a class certification and summary judgment and benefit of the bargain. By November 2nd, there will be briefing complete on Daubert motions.

So our recommendation, Your Honor, is that we allow the district court to do these rulings. Your Honor started the

day -- I have the quote from Mr. Weisfelner where he recognized that what is happening in the district court would have an impact on the buckets of claims that would be the subject of an estimation hearing. And so our approach would be to allow that to proceed, and we would be back before the Court after those issues are resolved.

THE COURT: Okay. I see some irony in the fact that New GM has taken the position -- I raised this before, that if economic loss plaintiffs recover -- can recover in the bankruptcy court, they have no claim against New GM. That puts aside the -- putting aside the whole successor liability issue, they have no claim against New GM, and yet you want to litigate this in the district court where you say they wouldn't be able to recover.

MR. BASTA: I understand the irony, Your Honor. I think that what -- our position is as follows, which makes this case unique. Normally, in a bankruptcy claim context, we'd go to the bankruptcy court and ask the bankruptcy court to rule on Class 23, or they would ask the bankruptcy court to rule on Class 23. This is complicated because plaintiffs first sought class certification in the district court and --

THE COURT: No. That was before there was a settlement in the GUC Trust.

MR. BASTA: And before there was a -- but they are proceeding --

THE COURT: Which is a -- you know, changes the posture rather dramatically.

MR. BASTA: I understand, Your Honor. But we do have a class certification process happening in the district court already.

THE COURT: If the claims were -- if the cases, not claims -- if the cases were going to be litigated to judgment in the district court, that all makes perfect sense to me. But in the context in which the GUC Trust and the signatory plaintiffs are seeking to settle, even if I conclude that Rule 23 applies, it seems to me fundamentally different the issue that the -- issues that the bankruptcy court would need to resolve than the district court would need to resolve if claims against New GM are litigated to judgment.

MR. BASTA: I would like to address that, Your Honor, because we believe that there's substantial overlap between the class --

THE COURT: You said that in your papers, and they say they don't think there's substantial overlap.

MR. BASTA: And they don't. But if Your Honor would like to hear more about -- when we started, we had filed a stay motion. In that stay motion, we argued why Your Honor should not decide class certification. You should let the MDL do the class certification. That motion was predicated on the substantial overlap on class certification issues.

One of the reasons Mr. Nomellini is here from Kirkland is that I think he can, if Your Honor would like to get into it, explain, if we were going to get into class certification in this court, what would be entailed and how much overlap and long it would take vis-a-vis what's happening in the MDL.

And so I don't know where Your Honor is going to come out on today's hearing. And Your Honor in the order this morning said you wanted to hear from the parties about what next steps are, and we're prepared to discuss that. We would like to put a marker down and say we think that class certification here would be highly duplicative on the issues of common issues of law and common issues of fact, and it's highly intertwined between benefit of the bargain, manifest defect, and Daubert, issues that are already being decided. Because the resolution of that substantive issues go to whether there are common issues of law across the board.

THE COURT: I'll wait to hear that.

MR. BASTA: Okay. Any further questions for me at this time, Your Honor?

THE COURT: Not at this time.

MR. BASTA: Thank you.

THE COURT: Thank you very much. All right. I don't know how the argument among the GUC Trust and participating signatory is going to be divided or not. I purposely didn't

address that issue.

MS. GOING: My son did that for me.

THE COURT: I'm impressed.

MS. GOING: I am, too. Good afternoon, Your Honor. Kristin Going, Drinker Biddle on behalf of the GUC Trust.

Your Honor, I thought I would do a little bit of reverse order and start with just three points of rebuttal to Mr. Basta's presentation. The first one -- and I'm not going to belabor this point, but as far as the consideration for the release, there is $21 million of real money that the GUC trust is contributing to the settlement. And that might not be significant to New GM, but it's certainly significant to the GUC Trust, particularly in light of the fact that, as you know all too well, the avoidance action litigation is now going to go forward so that --

THE COURT: Are you telling me something I didn't know?

MS. GOING: No. I've read the same papers you have. But to us, that means that this could be the last $21 million in the GUC Trust if we end up having to pay out the full amount of the avoidance action claim.

Second, while I appreciate Mr. Basta raising the MSR Resorts case, I am going to disagree with his analysis that this was not seeking estimation of an unfiled claim for allowance. It certainly reads like that is exactly what they

sought and, in fact, the settlement provides for a specific claim amount. And so I don't know how it could be anything else but for allowance. I think --

THE COURT: But it was still a two-party dispute fundamentally, wasn't it?

MS. GOING: It was, Your Honor. But I'm not sure how --

THE COURT: I mean, my comment to Mr. Basta, estimation has been used, including by me, to estimate -- I use the claim -- I use the term "claims" loosely because it's been used for administrative claims, which aren't really claims. Administrative expense, that's probably -- the statute doesn't provide for it. Judges have used it, used estimation. Estimation has been used in a number -- because it's very practical. It cuts through a lot of things and can resolve a lot of issues that otherwise could take years sometimes.

But MSR was not -- was fundamentally a two-party dispute. Both parties agreed to the procedure the Judge Lang used. Am I right in that?

MS. GOING: No. In fact, Marriott objected to this notion. Ironically, they called it -- the objected on the grounds that it was an attempt by the debtor to estimate a hypothetical claim. I've heard that before. But I'm not sure -- and I'll certainly get into it in my presentation. But nothing in 502(c) or any estimation cases that I've seen has

made that distinction that somehow estimation is allowed to be used when it's a two-party dispute, but not when it's a multi party dispute or a class action. And again, that's going to go to the point that we believe it's claims, which is a right to payment, not a proof of claim that is being estimated.

That brings me to my next point, which is that I got the sense that New GM either believes or is trying to argue that the settlement agreement somehow allows the proofs of claim. And that's not the case at all. If you look at section 2.5 of the settlement agreement, what we are agreeing to is we are consenting to the late filing of the proofs of claim and agreeing to seek an estimation order that would estimate the aggregated allowed amount. So all we are agreeing to is to allow those late claims to be filed.

And I think this idea that New GM continues to focus on the proofs of claim is a red herring, because in effect, we could estimate -- and I'm going to go through the contracts that show. We could estimate without the settlement. We could estimate without proofs of claim. I think New GM is really seizing on the procedural morass that has occurred in this case to try to argue the fact that we have to go through this entire process to determine whether or not late claims can be allowed before we can move forward.

But the reality is, the reason why we even have this notion of whether or not late claims can be allowed is because

we have claimants who didn't receive notice of when they could file a claim timely. So I don't think that they should be allowed to use this procedural process as a shield and argue that there are all these steps that must be jumped through, when really, what the settlement is trying to do is resolve years and years of problems that arise from the fact that these claims weren't in the original bankruptcy and not --

THE COURT: Putting aside the terms of this specific settlement, could the GUC Trust agree that the -- all of the late claims could be filed and then essentially object to large groups of the claims because these people are in states where manifestation is required and they're -- they didn't manifest. All of the arguments, which essentially would have to be dealt with in an estimation proceeding, the GUC Trust has the ability to agree to the filing of the late claims.

MS. GOING: Absolutely. Absolutely. So now I'm going to start with, I think, the one area where we agree with New GM, and that is really how they framed the question that's before Your Honor. And this was paragraph 4 of their brief where they said, "The first question, the gating question is whether or not you can estimate proofs of claim, or can you estimate claims as defined in 101(5) of the Bankruptcy Code." And then they said -- sorry.

UNIDENTIFIED: That's okay.

MS. GOING: And I think this is important. They

said, "If the answer to that question is no, then can you estimate these claims without deciding whether or not rule certification is necessary?" And it's important here, because they recognized the problem that if, in fact, you decide that you can estimate claims, then you don't even need to get to the question of Rule 23 certification. Because it's only if you decide that a court can only estimate proofs of claim that you start going down the "rabbit hole," as I'll call it, of Rule 23.

THE COURT: But I understood Mr. Basta's argument to say that the statute in the rules only permits distributions to people who will file proofs of claim, and that the agency principle requires that for -- to file proofs of claim on anybody's behalf you either certify the class, or they, themselves, file a proof of claim.

So you can't -- do you believe that there can be distributions to economic loss plaintiffs who either haven't filed proofs of claims themselves or a class claim hasn't been filed on their behalf?

MS. GOING: Yes, I do.

THE COURT: What's the basis?

MS. GOING: Because --

THE COURT: Mr. Basta has gone through statutory sections, rule section, et cetera at some length to say the code and the rules only permit distributions to people who have

allowed claims. They have an allowed claim. You have to either -- it's schedule and is not -- you know, it's not disputed, it's not unliquidated, all that, or you've filed a proof of claim.

MS. GOING: Absolutely. But, interestingly enough, the one section that Mr. Basta didn't put up there was 502(c), which is the mechanism by which you can estimate to -- in order to create an allowed claim that would then be paid. And I'm getting there with my statute.

THE COURT: Go ahead.

MS. GOING: So 502(c) states that there will be estimated for purposes of allowance. And the phrase "estimated for purposes of allowance" means that you're determining through the estimation process what the allowed amount of the claim is. New GM has consistently made this unbelievable argument that a proof of claim must be filed and allowed before it can be estimated.

THE COURT: Well, it can't be allowed because then that's the whole point -- you can't -- if it's allowed --

MS. GOING: You can't estimate an --

THE COURT: -- a fixed amount, there's nothing to estimate.

MS. GOING: That's right. Right. And then our second point regarding the statute is: What can be estimated? And 502(c) answers that question by saying it's any contingent

or unliquidated claim. Again, noticeably absent is proof of claim, or claim, proof of which has been filed under section 501.

So here we have the difference between a claim and a proof of claim. And as the legislative history has told us, Congress intended "claim," as defined under the Bankruptcy Code, to have the broadest possible definition. And they use that broad definition when setting forth the process and procedure for estimation in 502(c).

In their brief, New GM has made this analogy with 1129(b), cramdown section. And they were citing that as an argument as to why you, Judge, should interchange proof of claim with claim in the Bankruptcy Code. But I think when I actually went through that myself, I thought, you know, this actually proves our point because 1129(b) provides that you have to pay the present value of a secured creditor's claim, right.

If you exchange that for proof of claim -- if claim really meant proof of claim in 1129(b), then you could easily have a situation where a secured debt gets schedule. Secured creditor then wouldn't have to file a proof of claim. And the debtor would turn around and say, aha, under 1129(b), I only have to pay the present value of your proof of claim. And because you didn't file a proof of claim, I don't have to pay you anything. And I think if that's the case, I really believe

Mr. Basta, being an excellent debtor's lawyer, he would've exploited that loophole a long time ago.

THE COURT: Do you have a hard copy of your slides --

MS. GOING: I do.

THE COURT: -- for me?

MS. GOING: I'm sorry, Your Honor. If you want me to --

THE COURT: Just because I do make --

MS. GOING: -- hand it up.

THE COURT: -- notes on them (indiscernible). Thank you.

MR. BASTA: Thank you.

MS. GOING: New GM's entire argument about claim and proof of claim and the fact that every time you read claim, you really have to read the words "proof of claim," that flies in the face of basic contract interpretation principles. And again, if you look at, in contrast, 502(c) and 502(a), you can see that when Congress intended to talk about a proof of claim in the Bankruptcy Code, it knew how to do so. And that the words "proof of claim" cannot be read into and exchanged for every instance where the Bankruptcy Code says "claim."

I'm going to turn now to the various contracts and agreements where the estimation process is contemplated. And so first the sale agreement. New GM has literally twisted themselves into a pretzel trying to contort the language of

this first sentence of 3.2. They consistently failed to cite the first phrase of this sentence, which says, "At any time." And I believe that that's because they realized that that is particularly problematic if you consider the history and when this agreement was actually entered into, because the sale agreement was entered into in July of 2009. And it says, "At any time, we can -- the sellers can seek an order -- a claims estimate order."

At that point, not only was there not a bar date, but there hadn't even been a motion to set a bar date. The motion to set the bar date was filed on September 2nd, and the bar date for all proofs of claim was November 30th.

So what this language actually contemplates, the sellers, Old GM, could have literally gone the very next day and filed a motion seeking to estimate the entirety of the claims against the estate before any of them had been filed. So regardless of what 502(c) says -- and we believe it also authorizes the estimation of claims -- the sale agreement that New GM entered into specifically allows for the estimation of something other than just proofs of claim.

THE COURT: So what would the purpose of the estimation had been at that very early stage of the case?

MS. GOING: So the purpose would be -- I mean, we've understood that to be a purchase price adjustment. That at the time the sale was agreed to, there was, you know, a belief that

claims would be in X amount, and if it ended up being that the claims were higher than X amount, then New GM would pay an additional value. And so that provision --

THE COURT: But that wouldn't be an estimation for distribution purposes. It would be an estimation for the purposes of determining what New GM had to pay. Am I right in that? I mean, because your point that this is all before there even is a bar date. You have no idea what the amount of the proofs of claim that'll be filed. And yet the agreement provided that there -- Old GM could've requested an estimation.

MS. GOING: But it's not --

THE COURT: And the purchase price would be adjusted if the estimation was over $35 billion. But that wouldn't determine any of the amounts that would be paid for distribution.

MS. GOING: I don't believe that actually is the case, Your Honor.

THE COURT: Why not?

MS. GOING: Because if you read the words --

THE COURT: How could it be otherwise?

MS. GOING: Because it's -- because that's what they agreed to, estimating the aggregate allowed general unsecured claims against the seller's estates.

THE COURT: Yeah. But that doesn't say anything about distribution, who gets what. And how could it?

MS. GOING: You're right. Okay. It doesn't say anything about distribution, but it certainly establishes what the total amount of allowed unsecured claims are.

THE COURT: For the purposes of how much new GM had to pay for Old GM, correct?

MS. GOING: That language isn't in there, either.

THE COURT: You're the one who told me that this is, in effect, a provision that deals with a purchase price adjustment. If you estimate the claims and they're above $35 billion, New GM has got to pay more than it previously agreed.

MS. GOING: Absolutely, Your Honor. But if you're estimating the aggregate allowed amount of general unsecured claims, then you have actually established --

THE COURT: Show me where it says something about -- anything about distribution.

MS. GOING: It does not.

THE COURT: Okay. Go on.

MS. GOING: Turning to the language in the plan. Again, it is consistent with the sale agreement, which provides that the GUC Trust administrator may, at any time, request that the bankruptcy court estimate the contingent, undisputed, unliquidated claims under 502(c) of the Bankruptcy Code. Again, this is -- no mention of estimating proofs of claim, and also indicating that the GUC Trust administrator has the ability to do this at any time.

And the GUC Trust agreement, again, mirrors the other two documents to provide that the estimation can occur at any time, and it is an estimation of claims, of rights to payment. It's not an estimation of proofs of claim.

THE COURT: Okay. Isn't that the equivalent of what happens in the asbestos cases when claims are estimated for reserve purposes, not distribution purposes? Would you agree?

MS. GOING: I do agree. But -- even --

THE COURT: And here, this settlement contemplates estimating claims for distribution purposes.

MS. GOING: I -- no.

THE COURT: Mr. Weisfelner's shaking his head no.

MS. GOING: I don't agree, because I think it's no different in the asbestos cases.

THE COURT: But it's estimating the aggregate amount that would be paid subject to a plan that would have to be approved by the Court for how it would be distributed. It caps the amount that's going to be paid for allowed claims. The part's correct. Do you agree?

MS. GOING: Exactly.

THE COURT: Okay.

MS. GOING: Yes. Just like section 3.2 of the sale agreement.

THE COURT: On the asbestos cases. In fact, because of the jury trial rights, et cetera, the courts have said no,

this is not for distribution purposes. It's purposes of reserve, and maybe there's -- you know, a question I've never quite understood is: What happens if there's not enough money in the reserve at the end of the day?

MS. GOING: But that's exactly what we have here with section 3.2 of the sale agreement where it would be capping -- seeking estimation to cap the total amount of generalized secured claims. The reason why I say it's not for distribution purposes is because you -- as you outlined, the resolution of the estimation doesn't actually delineate who gets X dollars. There's an additional process, right? You are estimating the total amount --

THE COURT: So maybe Mr. Basta's partly correct and partly incorrect that a settlement with the GUC Trust can provide for estimation of the aggregate amount and determine how much, if any, New GM has to -- how many additional shares it has to come forward with. And that is separate from the issue of distribution.

And it may be that class certification for distribution purposes has to happen, but the -- a settlement -- not this settlement. A settlement could provide for estimation for purposes of determining whether New GM has to contribute additional shares. And some different procedure may have to be followed, including Rule 23 certification to determine who gets what.

MS. GOING: I agree with that, Your Honor.

THE COURT: Okay. Go ahead.

MS. GOING: The last point I just wanted to touch on, the side letter, because it is also consistent with the other agreements. And again, this is an agreement that New GM signed and is bound by. And they agreed that we may, at any time, seek a claims estimate order as such term is defined under the sale agreement. So again, there is consistency throughout these documents. We're entitled to seek a claims estimate order at any time, and we're entitled to seek an estimate of a right to payment, not just proofs of claim. There's no limiting language in any of the agreements, nor in the statute.

THE COURT: Okay.

MS. GOING: And I'm going to turn the podium over to Mr. Weisfelner now to address the Rule 23 issues.

THE COURT: Okay. Thank you very much, Ms. Going.

MS. GOING: Thank you.

MR. WEISFELNER: Good afternoon, Judge. For the record, Edward Weisfelner together with my partner, Howard Steel. And on the phone I believe is our co-designated counsel, Sander Esserman, as well as the co-lead counsels, Steve Berman and Elizabeth Cabraser.

Your Honor, I apologize we are the only lawyer to address you today who didn't come with a PowerPoint presentation. I want you to be assured that that's not because

I'm the only lawyer who's not getting paid by the hour. It's just that we didn't think the PowerPoint presentation was necessary. I can assure you that I have prepared remarks that I'd like to ultimately go through. But I do want to take an opportunity out of sequence, and I will highlight the points again in my prepared remarks to address at least some of the issues that were raised during the colloquy between Your Honor and Mr. Basta.

Your Honor asked a question on asbestos cases. And in particular you asked what happens assuming that the estimation procedures that occur in those cases are for reserve purposes. And as far as I'm aware, typically once you set the reserve, it's not all over and done with. What happens, I think in every one of those cases, is the parties then negotiate over and produce what's known as a trust distribution procedure, otherwise known as the TDP. It's typically negotiated as between the futures representative or futures committee, the current tort committee with or without debtor's involvement. And it's that trust distribution procedure, which is put out on a notice to all affected parties, that determines who gets what out of the reserve that was set aside.

So to the extent that Your Honor still had that question, I wanted to address it. And it's not unlike what we contemplate in this case. Assuming that the settlement is approved, assuming there is then an estimation proceeding that

triggers all or any portion of the adjustment shares, there will be a subsequent procedure negotiated as between lead counsel for the economic loss plaintiffs and lead counsel for the personal injury/wrongful death claims to the extent they still exist after they're mediated and settled by GM. It will be under the auspices of Judge Cote, and will ultimately be presented to Your Honor on notice to --

THE COURT: Not Judge Cote. Who's the mediator?

MR. WEISFELNER: I thought it was Cote.

THE COURT: No.

MR. WEISFELNER: Cote. I'm mispronouncing it. Cote. And will ultimately be presented to Your Honor --

THE COURT: I have nothing wrong -- I think Judge Cote probably would want nothing to do with this, but --

MR. WEISFELNER: On notice again, Your Honor, to the world. And, Your Honor, I don't want to prejudge that stage of the proceeding, but were we obligated, required, or suggested that Rule 23 apply at this state, we'll consider it. But by that time, the adjustment shares having been triggered, GM may be out of our collective hairs then and forever.

THE COURT: Never.

MR. WEISFELNER: But you're probably right. It's never. Now, there was a concern, and again, I'll touch upon this in my prepared remarks, about agency and the agency length. Who's --

THE COURT: Well, it's American Reserve. I mean, this -- I understand -- it's not out of thin air. I mean, it's case law.

MR. WEISFELNER: Well, sure. But they're talking about who's going to protect -- for example, Weisfelner has cited for the proposition that we acknowledge 2 million cars can't possibly be part of the estimation. That's not what Weisfelner said, but let's assume for the purpose of this argument. Mr. Basta then argues, oh, my God, who's going to protect the 2 million that Weisfelner just threw under the bus?

These people on this side of the courtroom reflecting the plaintiff's side had no agency to resolve these issues in favor of any of the plaintiffs who aren't before you, let alone these poor individuals we threw under the bus.

Your Honor has posed in the past a hypothetical about, well, why couldn't I do what the settlement in the estimation motion asked me to do in a situation where the debtor scheduled the claims. And it's been pointed out, well, but if they scheduled it as contingent and unliquidated, it doesn't really get you very far.

I think of a different hypothetical that I think addresses the agency point of view. Imagine, if you would, a situation where you have an ad hoc committee that's very active in the case. Even an official committee that's very active in the case. That committee settles a dispute with a debtor in

possession. And the resolution of that dispute goes out on notice to the world, the absent creditors, claimholders that the ad hoc or official committee purported to represent, for their consideration and objection. No objection, or the objections are overruled.

That settlement's approved under the court's auspices using 9019, using 105 of the Bankruptcy Code. No suggestion that you need a class in order to protect the interest of the absent claimants who are invested in the agency of their official or ad hoc committee.

Now, Your Honor, I'm sort of glad that I heard Mr. Nomellini -- is that your name?

MR. NOMELLINI: Nomellini from Kirkland is here because we're all searching for cases that one could cite to as authority for different propositions. And I think we quite rightly cited to Mr. Basta's case, MSR Resources. I think an even more compelling case is a Kirkland case called GenOn. And I don't know, Paul, if you were involved in GenOn before you left, but you've got to listen to this case. And I have copies of the pleadings I'd like to hand up to you, and we have a set available for your clerk and one for opposing counsel. But I think this is a powerfully important case.

There were anti-trust actions pending in two different jurisdictions, pre-petition, those anti-trust actions were moved to an MDL. There were class proofs of claim filed

on behalf of two MDL classes. Those class proofs of claim, the claims of the underlying class members were resolved between the debtor represented by Kirkland and the class action plaintiff's lawyers.

THE COURT: Had there been a certified class?

MR. WEISFELNER: No. And the methodology for giving notice of the settlement, and an opportunity to be heard and object was under, gee, I don't know, 9019 of the bankruptcy rules and Bankruptcy Code section 105. Not a mention of section -- Rule 23. Not a reference to it even though there's a pending MDL. Even though the class was never certified. So the notion that you can't resolve potentially contested class claims that are filed as class claims before there's a settlement without application of Rule 23 is belied by New GM's counsel's own activities in the GenOn case. Not to mention --

THE COURT: Was the settlement approved?

MR. WEISFELNER: Your Honor, it's interesting. The hearing on that settlement was originally scheduled for July 11th. This hearing, GM's side sought to adjourn. You weren't aware of it, but they asked all of us if we could come up with different dates and propose different dates to you for reasons that were never made clear to us as to why they needed a different date.

Once it was clear that we weren't going to move today's hearing ate, coincidentally or not, I don't know, but

the GenOn hearing was kicked to the 25th of July, a couple of days from that. But I'll tell you, you look at the docket sheet, not one objection to the proposed settlement. Not one. A settlement, again, of class action proofs of claim that are being resolved by the bankruptcy court without reference to Rule 23.

That's to say nothing of the fact, by the way -- and again, I'll stress it when I go through my prepared remarks. Rule 23 applies in accordance with Rule 9014 in an adversary proceeding, X versus Y. It does not apply to a contested matter. The late claims motion is a contested matter. The settlement motion is a contested matter. The estimation motion is a contested matter, not an adversary proceeding. And by its terms, that being 9014, Rule 23 does not apply unless the court orders otherwise.

THE COURT: Yeah. And what American Reserve and other cases have said is that as applied to a proof of -- a class claim, it's a two-step inquiry. One, whether the court, in the exercise of its discretion, applies Rule 23. And if the court applies Rule 23, then you have to go on and satisfy the requirements of Rule 23, whether it's a settlement or litigated. You agree with that?

MR. WEISFELNER: Yes, I do. And, Your Honor, in particular, we cite for the proposition Your Honor just mentioned. And the cases that Mr. Basta relied on in his own

presentation, the three cases that just said what you said; Musicland, Blockbuster, and Judge Gerber's decision in GM having to do with GM's liability for apartheid. I didn't really get the connection until I read the case in some detail.

But what each of those cases say is we're not going to apply Rule 23 in this matter or trigger its application under 9014 because we have a better mechanism under bankruptcy.

THE COURT: Sure. If there were potentially 100 claimants or 200 claimants, have them file proofs of claim. They don't need a lawyer. They file a proof of claim. The Court can deal with it efficiently. Those situations don't involve 11.4 million potential claimants.

MR. WEISFELNER: Exactly right. Your Honor, the last point I want to make, and I'll dive into it in greater detail when I get through my prepared remarks, is the reliance on Amchem for the proposition that contested issues involving class certification can't be settled. That's not what Amchem stands for. I think we all know by now what the circumstances of Amchem was. It was a consorted effort among the asbestos plaintiffs' class with large, and the members of the CRV, I think it was called, the various defendant law firms that were part of the -- again, a collective that were dealing with asbestos claims.

And the problem that Amchem had was the claims that were being settled and asserted outside of a class context were

future claims, present claims, broken up into a variety of present claims, asbestosis, mesothelioma, lung cancer, no reference or provision for fear of cancer or a lot of other claims that, in the history of asbestos litigation, weren't getting compensated. And the argument that was made is, well, wait a second, how could you ever certify this class into the four theories of certification? Numericity, we'll give you that one. But commonality. What's the commonality between someone who died from asbestos and someone who's got pleural thickening?

That's why Amchem denied certification and said that if you're going to try and settle the issue of certification, you have to do it under a heightened degree of scrutiny. It does not stand for the proposition that New GM keeps touting that you can never settle Rule 23 certification issues in the context of a settlement.

THE COURT: I don't think they've taken that position, but maybe you read it that way. I don't. I think their position is that a settlement doesn't permit you to ignore the requirements for certification of a class.

MR. WEISFELNER: I agree with that.

THE COURT: You agree with that proposition.

MR. WEISFELNER: I think to the extent that --

THE COURT: That's what I understood their argument to be.

MR. WEISFELNER: Yeah. Well, I think they went a little above board, if not in their paper, certainly in today's presentation. Where I thought I saw the case cited for the proposition that you can't settle, period, class certifications.

THE COURT: Well, I reject that position. I don't think that was their position. But I would reject that position.

MR. WEISFELNER: Good. Then I'll skip that part of my prepared --

THE COURT: Mr. Basta, go ahead. (Indiscernible) on this point.

MR. BASTA: I hate to agree with Mr. Weisfelner, but that is --

THE COURT: Sometimes it's worthwhile to -- that's the argument share.

MR. BASTA: Yeah. Usually it's in another context. But it is our argument, and I can address it now or in --

THE COURT: No.

MR. BASTA: There is case law, Your Honor. It's not Amchem. But we cited in our brief cases that stand for the proposition that courts have an independent responsibility to make a determination that every Rule 23 requirement is met, and therefore parties may not settle or stipulate that a certifiable class exists outside of Rule 23. And there's a

body of law that stands for that proposition.

THE COURT: All right. Go ahead, Mr. Weisfelner.

MR. WEISFELNER: Okay. Then maybe I will stress it when I come to it. In any event, let me tell you by way of introduction that --

THE COURT: Well, I read a bankruptcy court decision yesterday which certified a class based on a stipulation of the parties because there had been a state court certification -- class certification beforehand, and the bankruptcy court concluded that that was satisfactory, that the stipulation that was entered into was -- basically satisfied the requirements for class certification based on what had been decided in the state court on certification.

MR. WEISFELNER: Your Honor, look, I'm hoping never to go down that rabbit hole with you and Mr. Basta because --

THE COURT: Well, your brief argued at some length that of course you can satisfy Rule 23.

MR. WEISFELNER: Well, you're right, because one always likes to have a fallback position. But our primary position is that neither the settlement motion nor the estimation motion requires certification of the class in order to protect the interest of absent claims. And I think that's really the first question, whether the rights of absent claimants are being properly protected in the settlement motion, the estimation motion in our proposed notice.

To a lesser extent, and to be generous, I guess the second question is whether New GM's rights are being properly protected in this context, assuming that, one, we're concerned about New GM's rights.

Look, it's our position that the proposed notice of settlement and the estimation proceedings utilizing Bankruptcy Rule 9019 and section 105 of the Code is both procedurally and substantively proper and sufficient, and that compliance with Rule 23 is not necessary. New GM contends, and I have to stress this, without a single case support its position, that this court may not settle or estimate unfiled claims, and that compliance with Rule 23 is mandatory. No court has ever held a compliance with Rule 23 is required.

THE COURT: Are there any cases that approve distribution to putative claimants that have not filed proofs of claim or are not part of a certified class?

MR. WEISFELNER: Yes, Your Honor. Every single one of the asbestos claims that had estimation for reserve purposes, and then subsequently had the court's approval of a TDP, a trust distribution procedure. There were separate procedures for how people put in, for lack of a better term, a "claim" against that trust, and how those claims were ultimately going to be resolved. And some of the TDPs afforded people the opportunity to opt out into a trial court system. Many of them didn't.

THE COURT: Are there reported decisions that approve distribution to putative creditors, claimants who have not filed proofs of claims or been part of a certified -- I'm not questioning that you say that's what's been done. But my question is, are there reported decisions that have addressed whether that is a appropriate or not. I don't remember seeing any.

MR. WEISFELNER: I'm not aware of any. And one would've thought that the researchers on my end would've found them if they existed. And I think that the inherent authority of distributions being made through the TDP process was inherent in the original reserve orders that set up the reserve. But, Your Honor, I can't (indiscernible) find it.

THE COURT: All right. Go ahead.

MR. WEISFELNER: As I said before, there is no single decision that held that compliance of Rule 23 is required alongside a 9019 procedure. Now, that's not to say that some courts haven't applied them simultaneously. Your Honor applied them simultaneously. My only point is it's not required, and in the context of this case, ought not be required.

And let's understand what it is that --

THE COURT: Was Partsearch your case?

MR. WEISFELNER: Say again.

THE COURT: Was Partsearch your case?

MR. WEISFELNER: It may have been my firm's, but it

wasn't mine personally, no.

THE COURT: Okay. I thought it was your firm.

MR. WEISFELNER: Let's remember what we're talking about in this case. We are talking about what happens to the so-called "adjustment shares" and who's going to get a part of those adjustment shares. The adjustment shares, at maximum, is worth $1 billion. We hope to be able to demonstrate to Your Honor that at $1 billion, you're not going to get economic loss claimants, let alone economic loss and personal injury claimants compensated either in full, or compensated consistent with what Mr. Golden's clients got as trust beneficiaries in the past.

So in that context, I think we have to remember that we are taking about not planned distributions that otherwise affect other general unsecured creditors. Here, we're talking about access to a purchase price adjustment that, by design, doesn't injure the trust beneficiaries. They get to keep what they got, and they get exclusive access to what's left without us crawling up their backs or seeking claw back. And, in exchange, we get whatever is there when Your Honor considers whether the adjustment shares ought to be satisfied.

I want to start with, first, principals. Absent claimants did not file timely proofs of claim in this case. That's absolutely true. But I think you have to take into account why. It was because they didn't receive due process

notice of the bar date in the first place, or any indication that they were sold and were operating dangerously defective, life-threatening cars.

It's also the case that Old GM didn't bother scheduling the plaintiff's claims, neither as an allowed amount or a contingent amount, or an unliquidated amount. And that's because Old GM didn't acknowledge that the defects existed, even though they should have known. It simply pretended that the defects didn't exist.

Now, in response to this fairly unique set of circumstances, this court already determined that the proper recourse was for the plaintiffs to seek authority to file late proofs of claim. In that context, co-leads and designated counsel filed an appropriate late claims motion seeking authority to file a late claim. And we attached to our late claims motion a proposed class proof of claim, which, as Mr. Basta indicated, we later amended.

Interestingly enough, neither the New GM or our adversary at the time, the GUC Trust, insisted at that point that all absent claimants had to file either an individual joinder to our motion, or, for that matter, individual proofs of claim. Instead, they were happy to rely on the proposed class claim that was filed by designated counsel and co-lead counsel. Why would they have to rely on the class claim and the late claims motion that we filed? Because to insist

otherwise would've cost them millions of dollars to effect due process notice to the absent members that, hey, you better file either a joinder to the late claims motion that Weisfelner filed, or come up with your own proof of claim, because we're never going to acknowledge that you, as a punitive member of this class, filed the claim.

They didn't do that because they were happy to rely on the agency, or the representative capacity, of designated counsel. In fact, New GM has consistently relied on the actions of co-lead and designated counsel in order to have a binding effect on absent claimants. They did it throughout these proceedings.

Just a couple of examples. In April of 2017, the hearing of -- April 20th hearing, Mr. Steinberg is quoted saying that at the August 31 status conference, designated counsel said, "We perceive ourselves as having taken the mantel of preserving and protecting the rights of non-ignition-switch plaintiffs in this court." Judge Gerber was looking for someone to be the representative counsel. And then if anybody wanted to get and effect supplement, what it is that we had to say, he was giving them the right to do that on their own. He was saying, who is going to -- because we litigated the 2014 threshold issues. We had designated counsel as well, too.

And basically, the designated counsel in the bankruptcy court are here. They're the representatives of the

lead counsel in the MDL. So the Brown Rudnick firm basically, as I said, is Hagens Berman and Lieff Cabraser's lawyer, and Mr. Weintraub is Bob Hilliard's lawyer. And the lead counsel in the MDL have a responsibility to be the representative counsel for the economic loss claims and the presale and post-sale accident claims.

I think that disposes of the agency argument by waiver. It goes beyond that. New GM's opening brief on the 2016 threshold issues at page 34, it's the ECF Number 13865, quote, "There's no question that non-ignition-switch plaintiffs and non-ignition-switch post-closing accident plaintiffs are among those bound by the November 2015 decision, December 2015 judgment. Designated counsel actively participated in all bankruptcy court proceedings through the issuance of the December 15th judgment." And the point was therefore absent members were bound.

November 16, 2016, order to show cause. This is 13-802 in the ECF system explaining that the rulings on the 2016 threshold issues, including the issue of whether plaintiff should be granted authority to file late claims, would be binding on all persons.

May 17th, and this is the last example, the hearing transcript at 203 through 208, New GM's counsel asserts that all plaintiffs served with a scheduling order identifying certain issues to be briefed were bound by the rulings on those

issues and had waived any arguments that were not raised in connection with that briefing.

Now, for the first time, GM is saying we've got to really be careful and protect the rights of absent creditors who didn't file claims, because we can't trust the representatives to serve their best interest. Let's remember, by the way, that the motion --

THE COURT: Well, that's what Rule 23 certification does. It determines whether the class representatives adequately represent the unnamed, unserved class members. Isn't that correct?

MR. WEISFELNER: Well, you're right. But, Your Honor, let's talk about what happens in a Rule 23 context versus the paradigm that we presented which is 9019, 105, and notice. So the difference is, if there is any, every member of our class on whose behalf we proffered a claim as part of the class proof of claim gets a notice that says we settled under Rule 9019 and 105. Here's exactly what the settlement provides, here's what's going to happen, we're hoping for an estimation proceeding but there's no guarantee.

If the estimation proceeding triggers the maximum adjustment shares, we're talking about a lot of money, and that lot of money is going to get divided up pursuant to a subsequent proceeding on notice to you at an opportunity to be heard in front of the bankruptcy court. Speak now or forever

hold your peace. That's the notice that we contemplate.

What's the notice that's contemplated under Rule 23 that's better or different? Listen, folks, there's a class -- actually, there are a bunch of subclasses. The representative members of those class have entered into a single identical settlement across the classes. To the extent that you think that you're not being properly treated vis-à-vis any other subclass member when you don't even know how much money there is to openly be divided, speak now or forever hold your peace. That's the same notice they're going to get.

How is it that compliance with Rule 23, assuming it's required, and we don't think it is, serves the interests of the absent creditors any better than the notice that we're professing? And there are a lot of reasons, by the way, why we didn't go the Rule 23 route, including most specifically, I'm telling you under Rule 23 there's a settlement. Don't ask me how much the settlement's for, don't ask me how much you're going to get out of it, you've just got to trust me.

And in the Rule 23 context, we thought that was going to be a lot harder to demonstrate. Maybe not impossible, certainly not impossible, as opposed to telling them under bankruptcy where you have in rem jurisdiction and it's a proceeding against the world, and you have jurisdiction against everyone to say speak now or forever hold your peace because we're asking to give a waiver and a release in favor of

triggering the estimation procedure which may or may not get you anything. But if we're successful, it could get you quite a lot to be determined. The "to be determined" part doesn't really fit the contours of Rule 23 notice as easily as 9019 and 105.

Now, you've got to remember that our late claims motion wasn't embraced by the GUC Trust. It was opposed by the GUC Trust, and opposed pretty vigorously. It was also opposed by the GUC Trust beneficiaries represented by Akin, and it was opposed by New GM. It was only after discovery and preliminary motion practice that we actually reached a settlement. Well, we reached a settlement, we had the settlement reneged on, we had the settlement resurrected --

THE COURT: Let's pass over that part of this.

MR. WEISFELNER: Okay. But now GM contends that the Court can adjudicate the rights of absent claimants without class certification and they're wrong. Again, I want to go over some of the applicable fundamental principles.

We all know that bankruptcy favors settlement. I don't have to go through all the cites. They're in our brief. We also know that bankruptcy is a collective proceeding. Levy v. Lewis, (2nd Cir. 1980). The bankruptcy court has authority to determine all claims, be they filed or not, to estate property, whether held by present or absent claimants. The cite to that is both 28 U.S.C. Section 1334(e), as construed by

Optical Techs at the Eleventh Circuit, 2005, and the Supreme Court's ruling in Tennessee Student Assistance, 541 U.S. 440, where the Court held, and I'm quoting: "A bankruptcy proceeding is one against the world." And that court's in rem jurisdiction permits to determine all claims that anyone, whether named in the action or not, has the property or thing in question.

It's in this context the bankruptcy court can issue bar orders under Section 105 to assist in settlements. It's the Munford case at Eleventh Circuit. And the bankruptcy court can channel claims to a settlement fund. That's the Johns-Manville case, Second Circuit 1988, and that's exactly the framework that we're utilizing here.

There is a res, the adjustment shares, as when and if they're triggered, Your Honor has in rem jurisdiction to determine everyone in the world's rights as to those adjustment shares. Once they exist, and only after they exist, we will present Your Honor with a mechanism for how to distribute the adjustment shares, and Your Honor will approve it on notice to everyone that's affected, and everyone will have an opportunity to step forward and claim that the distribution procedure somehow isn't fair or equitable.

THE COURT: So you argue in your brief, and I'm saying the alternative, that class certification is easily achievable here and non-opt-out class because it's a limited

fund case. And so if there were a structured settlement that provided for an estimation of the potential allowed amount, and I think Mr. Basta talked about the term has to be potentially allowable. It was an estimation of the potentially allowable claims and estimation went forward and it determined that GM has to pay 750 million in value, and then the question is, who gets that?

I know you say that it's been done in the asbestos cases through a separate trust and there are procedures about how distributions are -- claims against the trust, distributions from the trust. That's why I ask were there any cases that support that construct.

The settlement that's before me as part of the questions I asked this morning -- sorry they were so late -- but about does this settlement terminate if the Court requires Rule 7023 certification, really for distribution purposes? Okay. And I don't know -- I'm sure New GM would be even less thrilled if the Court determined that the potentially allowable claims total a billion dollars and then a year later it turns out, well, there really are only 750 million who are entitled to receive a distribution, what happens to that extra $250 million? New GM is required not to wait until the end of the day, but if the GUC Trust --

MR. WEISFELNER: Well, see, that's where we think GM's rights are going to be protected in the context of the

estimation proceeding.

THE COURT: I'm sure they're thrilled and very warmed by your saying that.

MR. WEISFELNER: No, I know. But that's opposed to them standing up and telling Your Honor that we need to protect the rights of the absent class members. Now, to the extent that they're talking about their rights, listen, I don't want to pay a billion dollars' worth of value, and somehow you're going to come up with a distribution procedure that's only going to allocate 750. What do we -- think about the logic of that. We have to convince Your Honor in estimating the claims in order to hit the maximum that we're 10 billion above the current threshold. So having put on that case that we're 10 billion above the threshold, triggering the billion dollars, we then have to apply the billion dollars to, by definition, $10 billion worth of claims. It's a ten-cent-on-the-dollar maximum distribution.

I can assure Your Honor, on penalty of being disbarred, we're not going to have $250 million left over to return to Mr. Basta's client. That concept makes no sense.

THE COURT: I know I'm taking this out of order, but the questions I asked in the order I entered this morning, can you tell me whether this settlement terminates if the Court concludes that 7023 certification of economic loss claimants is required?

MR. WEISFELNER: Okay. Your Honor, I've had an opportunity to consult with one of my lead counsel. I've had an opportunity to think about the question. I've had an opportunity to talk to Drinker Biddle. My understanding is they haven't had an opportunity to consult with their client. My view and the view of the people I've been able to consult with so far is that the settlement lives. We may have to go through it on a line-by-line basis to see what, if any, changes need to be made to it. But the concept of the settlement, the purpose of the settlement, the benefits of the settlement we think lives whether Your Honor requires certification of the class or not.

Your second question is, suppose Your Honor openly denies certification of the class, and I can give you my informed, thoughtful --

THE COURT: I don't think I asked that.

MR. WEISFELNER: Yeah, I thought you asked what happens if Your Honor applies Rule 23 and we can't comply with it. All right. The thing the signatory plaintiffs prepared to modify to provide the settlement terminates only if the Court does not certify one or more of the classes.

THE COURT: By that question, what I thought I was asking is, so if the GUC Trust and the signatory plaintiffs agree that either the current settlement or as modified would require, if the Court determined, required 7023 certification

of classes. If at the end -- I was I guess expressing that if a condition is -- if certification's not given, either side has the right to terminate the agreement. It's not, you know, back to the drawing board.

I was really -- the second question followed from the first. Does the proposed settlement terminate if the Court concludes settlement approval of economic loss claimants require certification of one or more classes?

MR. WEISFELNER: And I think the answer to that is no.

THE COURT: Well, you say no, but you -- justifiably, I only asked the question this morning.

MR. WEISFELNER: Right.

THE COURT: And if, at the end of the day, I conclude I can't certify the class, does the GUC Trust as signatory plaintiffs have the right to declare the agreement terminated?

THE WITNESS: I haven't thought about it, but I would think we'd all want to reserve the right if Your Honor doesn't certify the class to think about whether or not there's any basis to go forward. If you've required Rule 23 to apply and we can't comply with Rule 23, then I'm not sure the question is anything other than moot.

THE COURT: All right.

MR. WEISFELNER: I mean, let me quickly try and --

THE COURT: Go ahead. Go back to your prepared

argument.

MR. WEISFELNER: -- and complete this. Your Honor, GM takes the position that the bankruptcy court can approve this settlement of class proofs of claim without first certifying the class. However, as I've indicated, counsel for New GM is seeking to do just that in the (indiscernible) bankruptcy case. And Your Honor can read it for yourself, but that's --

THE COURT: Not tonight.

MR. WEISFELNER: But that's exactly what is going on there.

THE COURT: Did they file a brief in support of what they were doing?

MR. WEISFELNER: Just the motion, no brief. And, again, I don't think they anticipate and the docket doesn't reflect any objections. As an aside, we should also point out, as I think I have already, that Rule 23 doesn't even apply unless the Court orders otherwise.

By the way, I want to go back to the presentation that New GM gave you, and in particular I want to point to page 42 where you are taken through all of the applicable rules.

THE COURT: I actually turned over that page 42, turned over the corner of it to go back and look at it, so go ahead.

MR. WEISFELNER: Yeah, they talk about 302(a), 303(c)(2), 321, 502. What they didn't reference is Bankruptcy Rule 3004. 3004 provides in relevant part that the debtor or trustee may file a proof of claim on behalf of a creditor that has failed to file a timely claim. Let's do that again. That rule provides that a debtor can file a claim on behalf of a creditor that missed the bar date.

Well, as a practical matter, what does our settlement with the GUC trust do?

THE COURT: Yeah. The rule provides that they file a proof of claim within 30 days after the expiration of the time for filing claims.

MR. WEISFELNER: Right. But let's remember this case, okay?

THE COURT: You say that time hasn't run because of the due process notice.

MR. WEISFELNER: There was no effective bar date.

THE COURT: Okay. All right.

MR. WEISFELNER: So my point is, if the debtor, which is now being represented by the GUC Trust, could otherwise file a proof of claim on behalf of all the absent members, and then could settle those claims -- and this is not in the context of a plan. This is in the context of whacking up a price adjustment. That seems to be the construct of what we're asking for.

THE COURT: Well, that's kind of what I inartfully, without going to the rules, was basically what I was asking about at the last hearing. I did it inartfully, but what you're suggesting is is that Rule 3004 would permit the GUC Trust to file them as unliquidated proofs of claim for all economic loss claimants. Is that -- am I --

MR. WEISFELNER: That's my point, that, you know, it sort of does away with their agency argument. They didn't like us as an agent in this context. They liked us as agents every time they were looking to bind the absent members, but now they don't like us as agent. Well, do you like the debtor as an agent consistent with the bankruptcy rules itself? Your Honor --

THE COURT: Have you looked at what the law is with respect to Rule 3004 and how it's been applied?

MR. WEISFELNER: I have not. But, you know, again, it contemplates debtor's filing of late claims if the creditor has blown a bar date by 30 days. So then applicable to our case, you know, the creditor blew a bar date through no fault of its own by a period of a couple of years. All I'm saying is, if you think about it conceptually, you know, if a debtor can file a claim --

THE COURT: I don't know what the --

MR. WEISFELNER: -- can't the debtor's representative file a claim?

THE COURT: Yeah, I don't know. That's why I asked you whether you actually researched it, but I don't know whether or how it's been applied, but go ahead.

MR. WEISFELNER: In any event, you know, I look at the due process notice, and again, you know, sort of thinking about what greater rights are we affording the absent creditors here if we do Rule 23 or we do Bankruptcy Rule 9019?

THE COURT: Well, yeah. Sometimes the Supreme Court insists that procedures be followed precisely, if the rules require, in order to distribute from a debtor, debtor's estate to a creditor, that there be an allowed proof of claim.

MR. WEISFELNER: Sure.

THE COURT: Maybe there is a way you think you could do it without it. But if the rules require it, sometimes the Supreme Court requires you do it that way.

MR. WEISFELNER: Right. But I don't --

THE COURT: The bankruptcy court can't deviate from what the code and the rules provide.

MR. WEISFELNER: Your Honor, I don't disagree. But not only don't we have a Supreme Court decision that says that, we don't have a district court case that says that. We don't have --

THE COURT: Well, but Mr. Basta cites a number of code sections that say you have to have -- there has to be a claim that's been asserted.

MR. WEISFELNER: Right. But we can also -- and the plan provides and the sale agreement provides that Your Honor can estimate claims for allowance purposes. Once the claim is estimated for allowance purposes, the only operative then issue is for distribution purposes. And the Code sections talk about distributions in the context of a plan of reorganization.

The distributions we're talking about is in the context, not of the plan of reorganization, but of the sale agreement and the triggering of the additional sale proceeds because the claims were above a certain threshold amount. So it's outside the context, I would suggest, Your Honor, of the code provisions that New GM cites to where we've talked about though shalt not get a distribution under a plan of reorganization unless and until your claim is allowed. Well that's nice. We didn't have an opportunity to have our claims allowed together with everyone else's back in 2009.

THE COURT: And the answer to that is that, if you're permitted to file late claims, you'll get your chance now. It's not equitably moot because there is this accordion feature that would require New GM to pony up a lot more value.

MR. WEISFELNER: I sort of agree and disagree for the following reason. Had I been allowed way back when, before distributions started to be made to anybody else, and we're talking about distributing the extra billion dollars worth of claims, everyone would have had a pari-passu distribution of

some dollar amount. By definition, the GUC Trust beneficiaries would have gotten less cents on the dollar than what they've already received. And by definition, if I get 100 percent of the adjustment shares worth a billion dollars on account of $10 billion worth of claims, by definition, my constituent doesn't get more than ten cents on the dollar.

So the general rule that says you've got to comply with the code provisions that talk about allowance of claims for a distribution I suggest have already been violated, not by us, but by GM --

THE COURT: But Judge Gerber recognized that -- he gave with one hand, he said the remedy is motion for late claim, and he took away with the other by saying equitable mootness. Second Circuit vacates equitable mootness. And there is certainly nothing in what Judge Gerber said that indicated -- and I didn't see anything in the arguments that were made to him, because I did look. There was nothing in the arguments that suggest that he was made aware that there was this accordion feature that potentially required New GM to contribute an additional $1 billion.

MR. WEISFELNER: Well, I can assure Your Honor that Judge Gerber was very much aware.

THE COURT: I'm not so sure about that.

MR. WEISFELNER: It was in the papers and it was in oral argument. But neither here nor there, my point is this:

To slavishly adhere to the code provisions that talk about the filing of claims, the allowance of claims for distribution purposes is really outside the context of what this set of motions is all about.

THE COURT: You know, like or not, Mr. Weisfelner, the Supreme Court has limited the power of bankruptcy judges to depart from express provisions of the code. I can't use 105 because I think it would be more fair to folks to simply disregard what express code provisions require.

I feel quite constrained by that, particularly if the code and rules provide an avenue to potentially allow the signatory plaintiffs to accomplish exactly what they want. Maybe not the way they want to do it, but it does provide provisions that could get you there.

MR. WEISFELNER: And I guess all I'm saying is, if I take a look at 502 and I think about the allowance of claims as mandated by the bankruptcy code, and I talk about who can file a claim under the bankruptcy rules, and I think about the purpose for which the settlement and estimation motions are going forward, and it's not for distribution under a plan. And in particular, you know, their argument under Section 3.2 of the sale agreement, you've got to take a look at the legislative history of the sale agreement.

And I think this sort of plays into my argument on the statute and where I think Your Honor does have authority to

estimate these claims for purposes of triggering the adjustment shares subject to Your Honor's enforcement of whatever distributive mechanism we put forward before you, which may or may not require some additional protections. But 3.2 was designed in order to avoid improper dilution to the GUC Trust beneficiaries.

Well, you think about it, this is exactly what our settlement achieves. You get and keep everything that you were given before under the plan. We get and keep only what we can demonstrate on the back of our own claims, not yours, would trigger the adjustment shares. The claims and the allowance of claims up to this point in the case is done. It's below the threshold to trigger the adjustment shares.

They ain't never going to get triggered unless you allow the people who were deprived of the right of filing proofs of claim and who relied because everyone wanted them to rely on us filing a class proof of claim on their behalf. Your Honor, you're not allowing these claims for distribution purposes pursuant to a plan. You're allowing these claims for subsequent consideration of distribution pursuant to procedures that will be developed and presented to you with an opportunity to consider them and object down the road.

And for those reasons, I think it's the height of irony that New GM would force a Rule 23 compliance here so that we can then argue about whether or not we comply with Rule 23.

This thing will drag on for another period of time, which is not the be-all and end-all of whether or not you've got to comply with the law. I get that. But again, Your Honor, I suggest to you, with all humility and respect, that there's nothing in the code or the rules --

THE COURT: That's like saying with all due respect Your Honor, but --

MR. WEISFELNER: I guess it is like that, so maybe I'll just say it straight out.

THE COURT: Why don't you drop that part.

MR. WEISFELNER: Listen, Judge, I think that construction of the statutes that provides that anytime you have a proof of claim that has been settled in terms of whether or not it represents allowed or allowable claims, and the debtor is simply saying I don't have any objection to the allowance of the claims, but I don't know how much the claims are worth so I'm asking the Court to please estimate them.

THE COURT: Well, you know, I'm wondering would the GUC Trust by itself have standing to tell the Court we are going to permit the filing of late claims for both personal injury, wrongful death, and economic loss plaintiffs, and we request pursuant to the sale agreement and the side letter that we go forward now and estimate the expected allowed amount of general unsecured claims, and no Rule 23 certification is required to do any of that.

Once you have determined the estimated aggregate allowed amount of the claims and the amount of additional shares that New GM is required to give us, the Court will then be asked to determine how it should be distributed. And it is possible that the Court will have -- that it will require certification of classes of economic loss claimants in order to do the distribution.

But there is nothing in the Code or in the sale agreement or the side letter that requires certification of classes or class for distribution purposes in order to authorize the Court to go ahead and estimate the claims. And let's say I go through and do that and determine that $750 million, and GM's going to appeal and do whatever it's going to do, and if it prevails, you know, if the GUC Trust prevails, GM better come up with the value.

And the issue about -- because nobody is presenting me with a plan of distribution. It's all subject to further negotiation agreement and ultimately approval of the Court. And I would commend Magistrate Judge Cott for trying to hammer that out.

What about what I just said doesn't work?

MR. WEISFELNER: Well, I'll let Your Honor into the thought processes when we were negotiating this not with Drinker Biddle but with their predecessor. And among the alternatives that were being suggested is a single solitary

motion along the lines that Your Honor suggested. We'd like Your Honor to estimate the aggregate allowed amount of claims to determine whether or not the adjustment shares are triggered.

The problem with that is that you have some embedded issues that we thought the settlement was required for. For example, we have a determination by a variety of courts, including the Second Circuit, that there was a depravation of due process as it related to the ignition switch defect cars cap letters. This settlement also resolves whether or not the non-ignition switch defect claimants suffered a due process right such that they too should have their claims estimated.

Notice I didn't use the word ability to file late claims but have their claims estimated. And there were other discrete issues that were settled.

THE COURT: And it would seem to me on that specific issue that the GUC Trust could also say, yes, we recognize that there are unadjudicated issues regarding due process violations for other than these few recalls. And we have decided in consultation with the signature plaintiffs that we will permit late claims to be filed on behalf of all putative claimants where there have been all of the -- they're going to have the burden of showing if there's been the ignition switch defects that -- not the ignition, this other kind of defect; a lot of them were related to the ignition switch -- resulted in

economic loss or was the cause of personal injury and wrongful death.

MR. WEISFELNER: But you already said that they'd have to file punitive claims. Who's filing? What claims?

THE COURT: No, I didn't say that. I'm clearing up putative claimants, okay, as opposed to filed claimants. And I guess the reason I'm, you know, anticipating that New GM's going to argue, but this group of plaintiffs don't have the authority to go ahead and negotiate with the GUC Trust, and so I'm trying to cut that part out. It seems to me everything I've suggested the GUC Trust could have decided on its own.

It could have decided, yes, we recognize that there are these additional potential due process violations, and we have decided not to contest that. We've decided to permit late claims on behalf of economic loss claimants who can show that the value was affected by all of these other recalls, as well.

MR. WEISFELNER: Well, Your Honor, certainly I will assure Your Honor that if Your Honor were to, unfortunately from our prospective, rule that Rule 23 does apply, we will go back to the drawing board and determine a mechanism that either avoids it or complies with it. But we think this settlement, as negotiated between us, the GUC Trust, and the GUC Trust beneficiaries makes imminent sense.

THE COURT: You know, I could be wrong about this and then go back and read a lot of materials again. It strikes me

that the Rule 23 issue really only comes into play with respect to distribution.

MR. WEISFELNER: And, Your Honor, it strikes us the same way, that it certainly doesn't apply to the settlement or estimation and may in fact apply down the road to distribution. Not that I'm conceding it will, but I certainly believe that the Court's power under 9019 and 105 is sufficient to get us through --

THE COURT: Look, Mr. Basta talked about potentially allowable general unsecured claims. He says the claim has to be filed for it to be potentially allowable. I'm not reading the sale agreement or the side letter as for the purposes of requiring estimation to determine how much in value from additional shares should be considered as requiring that.

MR. WEISFELNER: Your Honor, we agree. And if you don't have to have a filed claim, then I don't think you have to worry about certifying --

THE COURT: Well, I may have to worry about it before I can approve distribution.

MR. WEISFELNER: And, Your Honor, I'm prepared to concede that solely for purposes of today because I think we can get through settlement and estimation.

THE COURT: But ere is the question, and this was the reason for my order.

MR. WEISFELNER: Okay.

THE COURT: If you enter into a -- hypothetically, if you enter into a proposed settlement that requires A, B, and C, and the Court concludes I can't agree with C, does the settlement agreement fail and is it thereby terminated? Okay. I might agree with this construct that there's a settlement agreement, it requires estimation, and those go forward, but I don't agree that I can approve distributions without 7023, you know, class certification.

So that's why I asked the question. Does this settlement agreement in effect provide that, if I conclude Rule 7023 class certification is required for distribution, the settlement's terminated?

MR. WEISFELNER: And, Your Honor, I don't believe it is terminated. I believe we can --

THE COURT: I've read it four times in the last couple of days and it's unclear.

MR. WEISFELNER: Well, to the extent it's unclear, we will make it crystal clear if we're lucky in our negotiations with the parties. I believe that's our intent. I do believe that Your Honor could move forward to the settlement and estimation motion even after telling all of us that we will never get to distributions absent fill in the blank, whatever Your Honor ultimately tells us you're going to fill in. To our mind, the hard part --

THE COURT: I haven't made up my mind. I want to

make that clear, Mr. Weisfelner.

MR. WEISFELNER: And I know that. And all I'm suggesting, much in the way that people try and figure out what the way forward is, I think we set a date for notice, figure out if the notice is appropriate. Because if we do have some issues that have cropped up based on our meet and confer, which I won't go into today --

THE COURT: You'll solve those.

MR. WEISFELNER: We may or may not solve those. We may need Your Honor's approval on the methodology of resolution that we've temporarily come up with. I will just tell you that it looks like it's going to cost many, many millions of dollars above the $6 million budget to give actual notice to everyone because GM claims that they don't have the information, you have to go to Polk to get.

Polk will take four to six months to get it at a price of 11 cents per registration. And if the car's flipped over multiple times, it could be 11 cents, not times 11.4 million vehicles, but 11 cents time a multiple of 11.4.

THE COURT: Let me ask, and I -- my notes are buried under here, and I intended to ask this -- I wanted to ask this question. It's unclear to me whom you believe -- what is the scope of -- I know you use the small C class as opposed to the big C class, certified class. Who are the claimants who you are seeking to have compensated on the economic loss claims?

Is it only those people who owned their vehicles at the time of the sale to New GM? What about used car purchasers who purchased post-sale to GM pre-recalls? So the sale is 2009, the first recall is 2014. What about people who bought used cars between 2009 and the first recall in 2014?

MR. WEISFELNER: Your Honor, that's why you were right and Mr. Basta was wrong when you talked about the differences between the MDL and the bankruptcy. The answer to your specific question about who we purport to bind in this settlement and benefit through this settlement is anybody who suffered an economic loss because of their acquisition of a GM car up through and including the date of the sale, July of 2009. That would include the original purchasers, whatever year they bought their cars, and any subsequent owners of those same vehicles by virtue of used car sales, be they --

THE COURT: Up to 2009.

MR. WEISFELNER: Right. Be they direct or certified --

THE COURT: Not post-2009.

MR. WEISFELNER: Not post-2009. I hope I got that right. Someone throw something at me if I'm wrong. I got it right.

Your Honor, I just want to flip through my notes quickly to make sure I haven't left anything off.

Again, we cited any number of different decisions

including the Supreme Court in Martin v. Wilks, a 1989 decision, that where you have a special remedial scheme that forecloses successive litigation by non-litigants, for example, in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process.

Ephedra which my adversary cited, it does stand for the proposition that the superiority of class action is lost in bankruptcy. That's the quotation. Judge Rakoff stated that bankruptcy notice directed specifically at class members is a proper substitute for the protections provided by the notice requirements of Rule 23.

We talked about how we view the Amchem decision. It doesn't say you can never settle the issue of Rule 23, only that if you do try and settle it, the Court has to deal with heightened scrutiny. Estimation according to New GM is only done in the plan context. You only have to look at Chemtura out of the Southern District 2011 to see all the collected cases there where estimation was done for a variety of purposes -- reserves, voting, channeling claims, and a bunch of other stuff.

And we think MEASURE is a good example of a court in this jurisdiction estimating a claim without a proof of claim having been filed.

THE COURT: Channeling claims, doesn't that require

that at some point in time, as specified in whatever the agreement is, people have to come forward and put in their claim?

MR. WEISFELNER: Well, Your Honor, again, there's going to be a mechanism devised by virtue of discussions between plaintiffs' lawyers, both economic loss and personal injury, that affords everyone an opportunity to assert their entitlement to adjustment shares in a manner that is as efficient and fair as possible. And, Your Honor, or the mediation judge, if you don't like the way we propose to give notice, you don't like the way people stand up and say here's what I'm entitled to and here's why, you'll let us know and there will be no distribution until it's all approved.

THE COURT: Tell me, if you assume that I conclude that 7023 class certification is required and that the agreement is not terminated, it's either modified or does not terminate, how would you propose to proceed?

MR. WEISFELNER: Your Honor, I'm not sure. And I want to take an -- and the reason I say that is because I have some definitive ideas. I don't want to be so forward as to assume what the GUC Trust is going to agree or not agree to, and especially, you know, without some input from the GUC Trust beneficiary.

THE COURT: Okay. Fair enough.

MR. WEISFELNER: Your Honor, I'd also request that

the Court take careful consideration of the Hoffinger case. That was the pool case where the Court concluded there were likely to be other claims that arose in the future because of -- I don't remember if it was bad construct of the pools or whatnot. And in that case, the Court estimated claims, future claims, without having the benefit of any proof of claim having been filed.

Owens Corning, USG are two of the asbestos cases --

THE COURT: Yeah, but people don't collect unless they --

MR. WEISFELNER: Unless they make --

THE COURT: The asbestos is future claims and --

MR. WEISFELNER: That's right. And there's some mechanism in the trust beneficiary documentation that gets people their entitlement to the distribution.

THE COURT: Does that -- are there any cases that excuse the filing of prepetition collections and provide for distributions to injured people who suffered injury prepetition --

MR. WEISFELNER: Yes.

THE COURT: -- and didn't file proofs of claim?

MR. WEISFELNER: Yes. Many of the asbestos cases, as Your Honor may or may not know, are typically divided up into different disease categories. The diseases, some of the most significant diseases, don't manifest themselves, so you had the

injury but it hasn't manifested itself yet. This goes to the whole issue of triggering insurance coverage is that the claimants made policies that covered you during exposure or during manifestation, and we've got the ruling that applies to everybody.

But in any event, if you've got pleural plaques, you're entitled to a certain level of distribution. That's a prepetition claim. But what the trust distribution procedures provide for is if your pleural plaques ultimately result down the road in the manifestation of cancer or more serious mesothelioma, then there are provisions in the trust distribution mechanism for your claim to be accorded additional funding.

Let's remember that what's different about this case than all of the other asbestos cases is your economic losses aren't getting any worse. They ain't getting any better, but they're not getting any worse over time. So the complexity of the trust distribution procedures in some of these mass tort cases where exposure and manifestation can be years apart are very, very complicated.

I know we're working on the Takata case and coming up with distribution methodologies for people who suffered an injury based on the Takata air bags. And, again, it's a more streamlined process because we're not talking about the injuries getting any worse.

THE COURT: You know, I've never had to apply 524(g), but is there anything in 524(g) that deals with people who've suffered prepetition injury but didn't file a proof of claim able to be paid in the trust?

MR. WEISFELNER: Well, yeah. I mean, what 524(g) says, and I acknowledge that it is specific to the asbestos arena, is that whatever prepetition claims you have against the debtor are channeled to the fund that we've established. Remember the fund is typically made up primarily of insurance proceeds, so the channeling channels your claims to that fund and typically releases the contributing insurance carriers.

THE COURT: You know, my question is are people who are injured prepetition but didn't file a proof of claim, does 524(g) cover them as well?

MR. WEISFELNER: It does, but some would argue that the guaranty of 524(g) comes in the fact that you need a 75 percent vote in favor. And then questions do arise if we don't know who has a prepetition claim. Do we count them as part of the 75 percent or not? But otherwise the asbestos cases and other cases do estimate prepetition claims without the benefit of a filed proof of claim.

Chemtura collects those cases, and there are plenty of other cites in our brief, not to mention MEASURE, where prepetition claims get estimated without the benefit of a filed proof of claim. In fact, in MEASURE, they were estimating

rejection damages. The debtor hadn't even filed the motion to reject yet. It was just trying to estimate it so it understood whether or not it should sell the asset with or without the contract attaching to it.

THE COURT: Right.

MR. WEISFELNER: I'm just going to go through the last pages of my notes. I don't think I've missed anything.

Obviously, Your Honor discerned when you were getting all these arguments about what we said in our late claims motion, what we said in our proof of claim about the class actions was all done before we settled.

THE COURT: Briefly, Mr. Weisfelner, can you go ahead --

MR. WEISFELNER: Your Honor, I have nothing else.

THE COURT: Could you briefly address the issue of overlap between class certification in the district court and what's happening here?

MR. WEISFELNER: I can, Your Honor.

First and foremost, I think you have to understand the defendant. The defendant in this matter is Old GM, as represented by the GUC Trust. The defendant before Judge Furman is New General Motors. And putting aside the claims that sound in the nature of successor liability, New GM is being pursued for what is commonly referred to as independent claims.

What is it that New GM did, or failed to do, that caused the injury either to economic loss parties or personal injury wrongful death parties, having nothing to do with what it is Old GM did or failed to do, with the exception of successor liability, and having everything to do with duty to warn, failure to recall in a timely fashion, and other independent claims?

THE COURT: So your view of it is the MDL concerned successor liability and independent claims?

MR. WEISFELNER: Not only that, but it's considering and the timeline that you've seen for certification is certification for trial purposes and not certification for settlement purposes. And there are other --

THE COURT: All right. We're going to end here. I am likely to speak with Judge Furman about the class certification issues that he is being asked to or is likely to address and what, if any, because if I conclude Rule 7023 certification is not required, there won't be any. But if I can conclude 7023 certification is required, to what extent is there overlap? New GM deals with that extensively in their motion for stay which we're not arguing today.

But I just want to put everybody here on notice that I am going to be away part of -- I'll be back next Thursday. After I return, I expect to speak with Judge Furman about what's been happening here today and what the path forward is

likely to be.

Mr. Basta, I don't want to hear any further argument today.

MR. BASTA: Understood, Your Honor. I was just going to try to respond to Mr. Weisfelner's points, but I understand.

THE COURT: Okay. I've read a lot of paper and I appreciate the arguments that have been made, and the PowerPoints from Mr. Basta and Ms. Going. Mr. Weisfelner likes to talk it rather than show it.

Okay. Thank you, very much. We're adjourned.

(Proceedings concluded at 5:03 p.m.)

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C E R T I F I C A T I O N

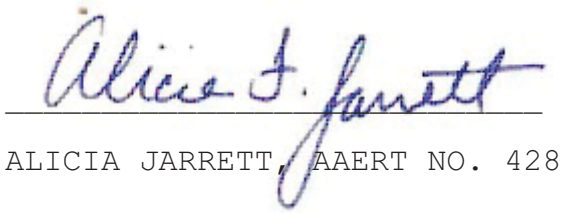
I, Ilene Watson, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

ILENE WATSON, AAERT NO. 447 DATE: July 21, 2018

ACCESS TRANSCRIPTS, LLC

C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



ALICIA JARRETT, AAERT NO. 428 DATE: July 21, 2018

ACCESS TRANSCRIPTS, LLC